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THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867

BY

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TO

MR. AND MRS. EDWIN FRANCIS GAY

PREFACE

By any criterion of measurement, the period within which this study falls was one of swift and vital economic change. A powerful contributory factor, and one of great future consequence, was the development and refinement of that instrument for the assembly and use of large amounts of capital—the business corporation, or, in English parlance, the joint-stock company. In several forms, it invaded an increasingly wide area of economic activity during the years 1800–67.

But freedom of incorporation—the general availability of all of the incidents and privileges of incorporation so essential to business organization of the present day—was, in fact, achieved only after a protracted and bitter struggle. In the interim, however, there grew up between the common law partnership and the corporation, strictly speaking, a quasi-corporate instrument possessing some of the characteristics of each. Failing to arrest its development, Parliament first turned to regulation but finally was forced to concede limited liability.

Viewed in retrospect, the regulation in the interest of investors reflects a realistic, it may seem cynical, view of the limitations on the power of regulation to save a fool from the fruits of his folly, which is in marked contrast with the blithe optimism which has characterized our own recent ventures into the same field.

This study formed the major part of a doctoral dissertation submitted in Harvard University, April 1, 1930. It has since been developed from an examination of additional materials available in the British Museum and Goldsmiths' Libraries. For aid to that end, as well as in publication, I have to thank the Committee on Research in the Social Sciences of Harvard University. The substance of Chapters II, III and IV has already appeared in the *Journal of Political Economy* for April and June,

1935. I appreciate the courtesy of the editors in extending permission to reprint material therefrom.

Most especially, I wish to acknowledge with deep gratitude the counsel and never failing kindness of Professor Edwin F. Gay, under whose direction it has been my privilege to work. For generous criticism and stimulating suggestion during final revision of the manuscript, I am indebted to Mr. George O. May. Finally, I would make such acknowledgment as the printed page affords to my wife, Dr. Helen Allen Hunt.

B. C. H.

56 Pine St.
New York
November 1, 1935

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THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867

CHAPTER I

INTRODUCTION: THE EIGHTEENTH CENTURY

That brilliant intellectual achievement of the Roman lawyers, the juristic person, a subject of rights and liabilities as is a natural person, seeped into the law of modern nations by way of canon law, albeit into common law partly by channels peculiar to England. The fusion of other ideas, however, such as those implicit in the gild, the *societas*, and the partnership *in commenda*, with the notion of corporate entity, their ultimate combination in the joint-stock company, and through it their gradual adaptation to the commercial needs of modern times, are beyond our immediate province. Nor can we discuss the gradual change in the conception of the corporation from that of a vehicle of special government, or a device *pro meliori gubernatione*, to that of a simple instrumentality for carrying on a large business. Suffice it to say that in the seventeenth century the commercial advantages flowing from and incident to incorporation were becoming clear: perpetuity or, at least, continuity of existence (and management) independent of that of members; ease of suit against third parties or against members; transferable shares; unlimited divisibility of the equities; and the distinct demarcation of liability for the debts of a corporation, as well as of that for the debts of its shareholders.[1]

[1] To quote the Charter of the Mines Royal (1568), incorporation avoided "divers and sundry great inconveniences which by the several deaths of the [members thereof] or their assigns should else from time to time ensue" (cf. Carr, *Select Charters of Trading Companies* [Selden Society, XXVIII], p. 5, and "Introduction," p. xix). Holdsworth points out that "as early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation; and after some hesitation, this conclusion was ultimately accepted in the latter part of the seventeenth century" (*History of English Law*, VIII, 203). The importance of non-liability for the debts of members was urged, for example, in the petition of the Silk Throwsters for incorporation in 1692: "If

In the classic *Case of Sutton's Hospital* (1615), Lord Coke declared that a lawful authority of incorporation was "of the essence of a corporation." To be valid, he explained, a corporation must be created by one of four means: by the common law (as the King himself); by authority of Parliament; by the King's charter; or by prescription. According to Holdsworth, Coke thus "summed up the mediaeval rules, and laid down the modern rule." But although it is safe to say that a charter from the King directly or by authorization of Parliament was from the first necessary for the formation of business corporations,[2] the fundamental legal distinction between a large partnership and an incorporated company was not, nevertheless, firmly grasped by the generality of business men until after the passage of the "Bubble Act" in 1720.

Historically, the necessary sanction of the state has been extended in several ways: (1) by prerogative charters; (2) by charter granted by the Crown under special statutory authority; (3) by special Act of Parliament; and (4) by mere registration of an association of men under general enabling acts. At first, it seems, the power to create corporations, or to endow commercial societies with "the incidents of corporations," in Blackstone's phrase, was exercised exclusively by the King. Most of those formed from 1485 to 1700 were in fact created by royal charter, and more often than not, some element of monopoly[3] was granted therewith. The Russia Company (1555), the East India Company (1600), and the Hudson's Bay Company (1670), for in-

such an undertaking should be carried on only by articles of partnership, the stock will be liable to the particular and private debts of the several partners, and subject to be torn to pieces by the bankruptcy of any of them" (*State Papers Domestic* [1691–92], p. 287; for others of similar tenor, cf. pp. 344, 523; and also Lipson, *Economic History of England*, III, 218).

[2] Cf. Williston, "History of the Law of Business Corporations before 1800," *Harvard Law Review*, II (1888), 114.

[3] It will be remembered that in 1623 the Statute of Monopolies (Section 9) had exempted charters granted to "any companies . . . created for the maintenance . . . of trade." As Carr says, "The storm which finally swept away individual monopolists beat almost in vain upon monopolist corporations, for corporateness was founded on the rock of industrial tradition" (*op. cit.*, p. lxiii). We shall find that "company" remained synonomous with "monopoly" in the minds of many men well down into the nineteenth century.

stance, were chartered directly by the Crown without benefit of Parliament, although later they were "regulated" by statute. After the Revolution of 1688, at least, a grant of monopoly such as they received would have required in actuality, of course, the sanction of the Legislature. Discussing an eighteenth century charter so sanctioned, Lord Lindley once observed that while the Crown could by its prerogative incorporate any number of persons who assented to be incorporated, it was not within that power to give them any rights in the way of monopolies.[4]

Secondly, charters or equivalent letters patent were granted by the Crown in pursuance of special statutory authority as, for example, in the case of the Bank of England (1694) and the London Assurance (1720). In 1806 a well-informed writer stated that in lieu of charters directly from the Crown "the more general practice had been to exercise the royal prerogative, in establishing trading companies, in concurrence with the two other branches of the Legislature."[5] He instanced the Sierra Leone Company, the British Fishery, and several dock companies such as the West India and the London.

Again, promoters might seek privileges directly from Parliament. Incorporation by special act became common with the establishment of canal (and water) companies in the latter half of the eighteenth century and, in fact, continued thereafter typical of public utilities. Formation of a joint-stock company with limited liability by the now familiar process of registration under general statutes did not, however, become a matter of general right until after the middle of the nineteenth century. For various reasons which we shall discuss, the incidents of incorporation so necessary to modern business organization remained until then either a dispensation or a favor within the special gift of Parliament or a carefully guarded bureaucratic concession. Indeed,

[4] Cf. *Elve* v. *Boyton*, 1 Ch. (1891), 507. The recital of the Bubble Act (*infra*), which authorized the grant to the company in question, may be quoted: ". . . whereas the sole Right and Prerogative of granting Charters of Incorporation (not being such as are repugnant to any Law or Statute of this Realm) both belong to your Majesty."

[5] [Sir Frederick Eden, Bart.], *On the Policy and Expediency of Granting Insurance Charters* (1806), p. 64.

freedom of incorporation was achieved only after a protracted and bitter struggle against deeply rooted prejudice, widespread misconception and even fear. Early in the eighteenth century, the development of corporate enterprise received a severe setback and some account thereof is an essential preface to the period of which this volume is a study.

The company promotions and the boom of the last decade of the seventeenth century, and the striking phenomena of the subsequent bubble period which culminated in the South Sea crash of 1720, have been chronicled and analyzed elsewhere.[6] In sum, it had been recognized by 1700 that "the joint stock company was a valuable instrument for the promotion and working of new industries, and for the mobilization of national credit. On the other hand, it had also become clear that it could be used to perpetrate gross frauds upon the public, and to encourage wild speculation and gambling in stock and shares."[7] In 1696 His Majesty's Commissioners for Trade and Plantations complained of "the pernicious art of stock-jobbing [which had] so wholly perverted the end and design of companies and corporations—erected for the introducing or carrying on of manufactures—to the private profit of the first projectors, that the privileges granted to them have commonly been made no other use of by the first procurers and subscribers, but to sell again with advantage to ignorant men drawn in by the reputation, falsely raised and artfully spread, concerning the thriving state of their stock."[8] Parliament's only antidote at that time was a statute which attempted to regulate the practices of brokers.

In 1720, at the high levels of the prevailing orgy of company promotion and speculation, "a panic stricken Parliament," as Maitland has put it, "issued a law which even when we now read it, seems to scream at us from the Statute book."[9] The

[6] Cf. Macaulay, *History of England*, Ch. XIX; Scott, *Joint Stock Companies to 1720*, I, Ch. XVII–XXI, incl.; and Holdsworth, *op. cit.*, VIII, 206–22, *passim*.

[7] Holdsworth, *op. cit.*, p. 213.

[8] *House of Commons Journals*, XI (1696), 595.

[9] "Trust and Corporation," *Collected Papers*, III, 390.

House of Commons had resolved:

That for some time past several large subscriptions having been made by great numbers of persons in the City of London to carry on public undertakings, upon which the subscribers have paid in small proportions of their respective subscriptions, though amounting on the whole to great sums of money; and that the subscribers having acted as corporate bodies without any legal authority for their so doing, and thereby drawn in several unwary persons with unwarrantable undertakings, the said practices manifestly tend to the prejudices of the public trade and commerce of the kingdom.[10]

More specifically, the Bubble Act (6 Geo. I, c. 18.), which was passed consecutively, complained of persons "who contrived dangerous and mischievous undertakings or projects under false pretense of the public good;" who had "presumed to open books for public subscriptions and draw in unwary persons to subscribe," and "to act as if they were corporate bodies;" who had "pretended to make their shares transferable," without legal authority; who had "acted or pretended to act under some charter formerly granted by the Crown" for other purposes, and had "acted under obsolete Charters." All such "undertakings and attempts" were to be "effectually suppressed and restrained," as tending to "the common grievance, prejudice and inconvenience," and to be punishable as public nuisances. Furthermore, the guilty were to sustain the ancient and terrible penalties of a *praemunire*;[11] injured parties were to be entitled to sue for treble damages; and brokers dealing in the shares of such "companies" became liable to a fine of £500. "Thus the genuine charter reigned supreme."[12]

[10] *House of Commons Journals*, XIX (1720), 351.

[11] "Fall into the compass of a *praemunire*,—
That therefore such a writ be sued against you;
To forfeit all your goods, lands, tenements,
Chattels and whatsoever, and to be
Out of the King's protection: this is my charge."
(*Henry VIII*, III, II, 341.)
In the only case upon the Bubble Act recorded until the nineteenth century (*Rex* v. *Cawood* [1723], 2 Raymond 1361), in which the defendant was found guilty of "setting up a bubble called the North Sea," the Court were of the opinion that they were not obliged by the Act to give the whole judgment as in a case of a *praemunire* against him and merely imposed a fine of £5 and imprisonment during the King's pleasure.

[12] Carr, *op. cit.*, p. cxxxi.

A century later it was pertinently said of this statute that like all laws passed upon the exigency of an occasion it had more of temporary malice and revenge than of permanent wisdom and policy.[13] Its passage was no doubt partly inspired by the directors of the South Sea Company, jealous of rival manufacturers and purveyors of the means and instruments of speculation. Exempt from the Act, the Company obtained writs of *scire facias* against several interlopers, though "in opening the eyes of the deluded multitude, they took away the main prop of their own tottering edifice."[14] The weapon which the aggressors had launched proved a boomerang of crushing force.

Both in and out of Parliament the joint-stock system was taken as "the sole and sufficient explanation of the miseries of the country. No words were too strong to condemn what was then considered to be a malign perversion of industry, destructive of commercial probity, [and] of a well-ordered social life."[15] Only a little less abuse was heaped upon the joint-stock type of organization than upon the directors of the South Sea Company.

[13] Cf. the *Morning Chronicle* (February 9, 1825).

[14] Coxe, *Memoirs of Walpole* (1820), II, 19.

[15] Scott, *op. cit.*, pp. 436–37. Of the many contemporary diatribes, that of Thomas Baston (*Thoughts on Trade*, 2nd ed. [1728], p. 3) may be quoted: "Projectors or Bubbles (call them what you please). The Nation suffered them a long time to cheat and ruine Innocent People; but these Insects swarmed so under The Sun shine [*sic*] of the late South-Sea Scheme, that the Parliament was necessitated to sweep them all off at once, by an Act: Yet they still crawl abroad, though in other Disguises." The *London Magazine* (I [1732], p. 4) declared: "The *English* could not, till of late, like the *Banditti*, rob in Clans or *Companies:* the National Debts, contracted within these forty or fifty years, occasioned several of these *Companies;* and Companies have stronger inducements to be corrupt, and are more secure in their Corruption, than single men: which is very good reason for *demolishing* all of them, which are not necessary to the good of the Kingdom, as soon as possible." (Italics in original.) A quarter-century later the same journal wrote: "Companies bring . . . mischiefs upon us; they give great and sudden estates to the managers and directors, upon the ruin of trade in general, and for the most part, if not always, bring ruin upon thousands of families who are embarked in the society itself. Those who are in the direction and the secret of the management, besides all other advantages, draw out and divide all their principal, and what they can borrow on their credit; persuade innocent and unwary people that they divide only the profits of their trade. . . . The benefits arising by these companies generally, and almost always fall to the share of the stock-jobbers, brokers, and those who cabal with them; or else are the rewards of clerks, thimblemen and men of nothing." (XXVII [1758], 407–8.)

The Government's association with that scheme, corruption in high office, "the extravagant notions entertained of the powers of a fund of credit, the facilities for fraud and negligence [in] the absence of any sort of legal control over the activities of promoters and directors"[16]—all fundamental factors in the situation —were ignored by Parliament. Its attention was concentrated upon the usurpation of corporate form and the correlative growth of stock-jobbing. Facing comparatively new problems and handicapped by "the extreme poverty of the ascertained rules of law applicable to commercial societies, whether corporate or unincorporate," Parliament deliberately placed the corporate form under lock and key. Circumstances, it would seem, called loudly for legislation which would, while facilitating incorporation, provide safeguards against fraud in promotion and management.

The Act of 1720 and the ensuing collapse of the great speculation arrested the development of joint-stock enterprise for many decades. In sum and in consequence, incorporation remained particular, not general. As Marshall has observed, we might otherwise have expected the spread of joint-stock enterprise over English business in that century.[17] And, in any event, there seems to be no doubt that for upwards of a hundred years, industry was deprived of capital which in other circumstances would have been available.[18] The legislation of 1720 was, in fact, to exercise a deterrent psychological effect upon company promotion even after its repeal under the pressure of a rising industrialism a century later. Before it disappeared from the statute book, it was to be resurrected from near oblivion by the law officers of the Crown again to attack alleged usurpers of corporate privileges and interlopers in "private trading."

In fact, however, the advantages of corporate organization in raising and in putting to use large masses of capital were unequivocally demonstrated before the close of the century. There were several survivors of the South Sea period. Moreover, Par-

[16] Holdsworth, *op. cit.*, VIII, 219.
[17] *Industry and Trade*, p. 312; cf. Holdsworth, *op. cit.*, IX, 45.
[18] Cf. Scott, *op. cit.*, p. 438.

liament let down the bars to admit canal companies. Following upon the success of Brindley and the Duke of Bridgewater, whose bill was passed in 1766, more than a hundred canal acts received assent by 1800, eighty-one of which were enacted during the "mania" of 1791–94.[19] The largest part of the English canal system, constructed almost entirely by private enterprise, was actually completed before 1800.[20] Canal shares became standard investments. Indeed, the formation of companies for other purposes, shortly, was to be attributed to the fact that "the frequency of subscriptions for making canals had showed the facility of raising large sums in this manner for any public undertaking."[21] The corporation had become something "more than simply one of the many shifty devices for raising money independent of Parliamentary supplies."[22] Loans had often been the price of charters. The oft-quoted approval which Adam Smith begrudged to banking, insurance, and canal companies, "and the similar trade of bringing water for the supply of a great city,"[23] may perhaps be taken as some index of progress to the time he wrote.

A few scattered instances of new corporations in manufacturing may also be mentioned. Manufacturers of cambrics and lawns in Winchelsea pleaded successfully that for the extension of their enterprise: "a Joint Stock will be necessary, because it cannot be carried on . . . without a great sum [and] . . . many Gentlemen willing to subscribe largely will not advance their Money, if answerable for more than they subscribe."[24] Parliament incorporated them as the English Linen Company in 1764.[24a] A few years later, against the loud opposition of other

[19] Clifford, *Private Bill Legislation* (1885), I, 41. The provisions of the canal acts served later as the basis of many of the provisions of early railway acts. Borrowing powers were first conferred in 1770 (*ibid.*, p. 79).

[20] Cf. *Final Report, Royal Commission on Canals, Parliamentary Papers*, XII (1910), 3–6. In citations hereafter, *Parliamentary Papers* will be abbreviated to *P.P.*

[21] Cf. the *Tradesman*, London (1808), I, 24–5, and *infra*.

[22] Price, *The English Patents of Monopoly* (1906), p. 41.

[23] *The Wealth of Nations* (1776), Cannan Edition, II, 246.

[24] *House of Commons Journals*, XXIX (1764), 785.

[24a] 4 Geo. III, c. 37.

brass and copper companies, a warrant was prepared for a grant of incorporation to the Warmley Company which had desired, particularly, transferable and divisible shares—facilities which were denied to "voluntary companies," so it was urged, under the Act of 1720.[25] The British Plate Glass Company was incorporated in 1773 "on a permanent foundation."[26] In contrast, a petition for the establishment of a Cotton and Linen Cloth Manufactory (1779), which recited at length the varied difficulties and disadvantages of the large common-law partnership, came to nothing.[27]

On the other hand, without benefit of Parliament or Crown and in the face of denial of incorporation, company organization in the form of numerous partnerships grew especially in insurance, as well as here and there in manufacturing. The Equitable Society, for example, applied for a charter in 1761 and was refused. In a report to the Privy Council, the Attorney-General advised as follows:

> The Crown has very wisely been always cautious of incorporating traders, because such bodies will either grow too great, or by overwhelming individuals become monopolies, or else by failing, will involve thousands in the ruin attendant upon corporate bankruptcy. As trade seldom requires the aid of such combinations, but thrives better when left open to the free speculations of private men; such measures are only expedient where trade is impracticable upon any other than a joint stock, as was thought to be the case in the East Indies, South Sea, Hudson's Bay, and some other companies erected upon that principle; but there does not appear to be any such necessity in the present case, because the business of insuring lives is carried on, not only by [the three existing companies] [28] but such policies are duly underwritten

[25] Cf. Hamilton, *The English Brass and Copper Industries to 1800* (1926), pp. 155–56. The works of the company were sold, however, and the warrant not proceeded with.

[26] *House of Commons Journals*, XXXIV (1773), 64. Of this company (and some others), Adam Smith wrote that they had "not even the pretext of any great or singular utility in the object which they pursue; nor does the pursuit of that object seem to require any expence unsuitable to the fortunes of many private men" (*op. cit.*, p. 248). We shall encounter this point of view frequently in the nineteenth century. The application of a Porcelain Company for "privileges" similar to those of the Plate Glass Company was "not proceeded with" (*House of Commons Journals*, XXXVIII [1782], 696).

[27] *Ibid.*, XXXVII (1779), 108. Cf. Mantoux, *The Industrial Revolution in the Eighteenth Century* (1928), pp. 255–56.

[28] The Amicable Society, chartered in 1706; the London, and the Royal Exchange, in 1720.

by numbers of private persons. Therefore, the law officers could not advise the Crown to trench upon the rights given to the three existing companies on the bare request of any set of men, without a clearer and more certain prospect of public good.[29]

It was suggested that the applicants carry out their scheme as an ordinary partnership. The modern Equitable was so founded, as was also, in 1782, the Phoenix Fire Office whose promoters had received an opinion of the Attorney-General that the public was likely to be better served by voluntary association of respectable individuals than by incorporated societies.[30] Moreover, several subsequent applications for *statutory* incorporation were refused by Parliament: that of the British Insurance Society in 1785 and that of the Westminster in 1789.[31] These were examples, soon to multiply, of "large societies on which the sun of royal or legislative favour did not shine, and as to whom the whole desire of the associates, and the whole aim of the ablest legal assistants they could obtain, was to make them as nearly a corporation as possible, with continuous existence, with transmissible and transferable stock, but without any individual right in any associate to bind the other associates, or to deal with the assets of the association."[32]

What men sought is tersely summarized in the following recital to the act which incorporated the Sierra Leone Company in 1791:

Whereas such undertakings cannot be conveniently carried on and supported, unless a considerable capital Joint Stock is raised for that purpose, . . . several persons have already formed themselves into a society and subscribed considerable sums of money for the purpose of establishing and carrying on . . . but are apprehensive that difficulties may arise in recovering debts . . . as in defending suits or actions which may be commenced or brought against the subscribers . . . as by law all the several subscribers and proprietors must both sue and be sued by their several and distinct names and descriptions; and it is expedient that the several sub-

[29] Quoted by Clifford, *op. cit.*, II, 615–16.

[30] Cf. Eden, *op. cit.*, Ch. IV, *passim.*

[31] Bills for both of these concerns passed the Commons but were not returned by the Lords (*House of Commons Journals*, XL, [1785], 1115; XLIV [1789], 539). The British Insurance complained that for want of incorporation, the Society could neither sue nor be sued (*ibid.*, XL, 1069).

[32] Per James, L. J., *Baird's Case*, 5 Ch. A. (1869–70), 734.

scribers and proprietors shall be protected from becoming liable beyond their respective shares.[33]

In fact, the history of the business corporation or joint-stock company in England during the one hundred and fifty years following the statute of 1720 is the story of an economic necessity forcing its way slowly and painfully to legal recognition against strong commercial prejudice in favor of "individual" enterprise, and in the face of determined attempts of both the legislature and the courts to deny it. For example, *The Times* was arguing in 1826 that joint-stock companies should "go out of fashion":

> We cannot see anything in the process by which wheat is converted into flour, or when it is manufactured, by which the cargo is transported over the sea, nor generally do we conceive that any such difficulty belongs to the simple supply of a European market with either grain or flour from Odessa, as would render that particular trade a more appropriate undertaking for a body of capitalists than for a single merchant. . . . The trade is of a nature more likely to flourish in the hands of private houses than of corporate bodies, which last can never successfully resist the vigilance or skill of their more active rivals.[34]

Several eruptions of company promotion and speculation in defiance of the law, and new industries, the development of which was beyond the limited resources of the individual capitalist, were forces which operated finally to break down opposition and to cause Parliament, retracing its steps, gradually to erect the legal framework of the new form of business organization.

[33] 31 Geo. III, c. 55.
[34] September 14, 1826.

CHAPTER II

EARLY NINETEENTH CENTURY GROWTH AND PROBLEMS

With the sharp fillip given to economic activity by the exigencies of war shortly after the turn of the century, there were vigorous efforts to widen the sphere of joint-stock organization. Association of men and capital was mooted in many new fields. The success of corporate enterprise in banking,[1] in insurance, and especially in the development of canals, had inspired the opinion that "companies might be extended to every branch of trade and manufacture."[2] Evidence of a contemporarily expanding securities market is found in the fact that between 1803, when the official price-list, *Course of Exchange*, was first published under the authority of the Stock Exchange, and 1811 the number of securities quoted more than doubled.[3] The years 1807 and 1808, in

[1] Especially the Bank of England. In Scotland joint-stock banking companies with many hundred partners were flourishing by this time. One may accept the opinion that "they would undoubtedly have been formed in England but for the Acts which restrained (1708–1826) more than six persons from associating for such purposes" (cf. Mundell, "Of Joint Stock Companies," in *The Influence of Interest and Prejudice upon Proceedings in Parliament* [1825]). Two abortive proposals for their establishment in England during the first decade of the century may be mentioned. In his *National Deposit Bank*, London (1807), F. A. Winsor offered a scheme for an establishment capitalized at £5 million which was to apply for a charter and "not to *oppose*, or *rival*, or *injure*, the Bank of England, but to go *hand* in *hand*, with reciprocal security, in the common cause of the Country's salvation!" (italics in original). In 1810, in consequence of "the late convulsion in the mercantile world, three of the first characters of the city" projected a company with a like capitalization under the name of the Commercial Loan and Interest Company. It was to have "a deposit branch, an interest branch, and a credit branch." (Cf. the *Tradesman*, V [1810], 369). The monopoly of the Bank of England and its influence is discussed further *infra*.

[2] *Ibid.*, I (1808), 24 f.

[3] Duguid, *The Story of the Stock Exchange* (1900), p. 96. There were included canal, dock, water, insurance, bridge, and road companies, and one iron railway, the Surrey.

Tooke's words "a period of almost universal excitement, leading as usual to hazardous adventure,"[4] witnessed an outburst of promotions, "some with exclusive privileges, but in general without any such advantage."[5] There was every appearance, wrote Samuel Baily of the Stock Exchange, that the times of the South-Sea Bubble were about to be revived.[6] In November, 1807, the *Morning Chronicle*[7] showed its concern over the situation. It opened its columns to an extended discussion of "the growing abuse of Joint Stock Companies [which were] rising up every day in such abundance, with so little pretension to public countenance and were established with such facility that it [was] only necessary to insert an advertisement in the Newspapers to procure a Subscription of a million for any project whatsoever." Nor was the episode localized in London—"every article of consumption, every species of manufacture, every line of trade" was found to be infected.[8] Although this clearly is an exaggeration, further correspondence did enumerate[9] some forty "societies actually established or projected" within the preceding six months as follows: 5 insurance companies, 7 brewing companies, 4 distillery companies, 5 companies to import and sell wine, 2 companies to manufacture and sell vinegar, 3 commission agencies, 3 coal companies, 1 medicine and drug company, 1 land company, 1 company to finance canal construction, 2 banking companies, 1 lighting and heating company, 2 copper companies, 1 paper manufacturing company, and 1 woollen company.

Of this first crop of nineteenth-century promotions, many "existed only in newspaper advertisements"[10] or were stillborn;

[4] *History of Prices*, I (1838), 277.

[5] *Viz.*, without incorporation; cf. the *Tradesman*, I (1808), 24.

[6] *An Account of the Several Life Assurance Companies Established in London* (1810), p. 19.

[7] November 5–24, 1807. Cf. *An Account of the South Sea Scheme of 1720 Intended as a Warning to the Present Age* (1806).

[8] November 5, 1807; cf. *ibid.*, November 9, 1807.

[9] *Ibid.*, November 20, 1807. A similar list appeared subsequently in the *Tradesman;* also in the *Monthly Magazine* (1808). From the last-named source Tooke derived his list.

[10] Philopatris, *Observations on Public Institutions, Monopolies and Joint Stock Companies* (1807).

others perished in the crisis of 1808[11] or were abandoned upon the action of the Attorney-General.[12] There were a few important survivors, however. The lighting and heating scheme developed shortly (and permanently) into the Gas Light and Coke Company.[13] Several of the insurance enterprises proved successful.

Although it is difficult in many cases to judge from the names with which the enterprises were christened, there were apparently several companies formed with the intention of engaging in manufacture as well as in trade. However, in those branches of industry really representative of the industrial revolution—the making of cloth, metal-working, and mining—joint-stock enterprise was of minor importance until much later in the century. Shafts of irony greeted company organization for merchandise distribution: "We may now enjoy the hope that the whole class of retail tradesmen will be rendered useless by the more splendid establishments of public commercial companies and the odium of being 'a nation of shop keepers' for ever removed."[14] Indeed, the fields of enterprise upon which a joint-stock company might legitimately and economically embark were, long after Adam Smith, a matter of much doubt and debate, and by many thought to be narrowly circumscribed. As an example of opinion at this time, we may cite a correspondent of the *Morning Chronicle*.[15] The objects which could "only be embraced by a numerous proprietary," he maintained, were clearly definable as follows: public works requiring great capital, years to complete, a long wait for returns on the investment; institutions involving particularly great and long-continued risk—life insurance, for example; societies for the promotion of the arts and literature; enterprises to prosecute foreign trade or banking. The formation of companies to pursue any business within the grasp of "private capital and individual management" should never be admitted; any to deal

[11] Cf. Tooke, *loc. cit.*
[12] Cf. the *Tradesman*, *loc. cit.*, and *infra*.
[13] *Infra*.
[14] Letter to the *London Chronicle*, Vol. CII (November 27, 1807).
[15] November 5, 1807.

in "articles of daily consumption" were plainly vicious. In fact, all great companies were similar in social consequences to "the monopolies and exclusive privileges sold by the Stuarts."

Indeed, the idea that a company was synonymous, or at least coextensive, with monopoly persisted well into the nineteenth century.[16] A definition of a company similar to the following from Thomas Mortimer's *Every Man His Own Broker or a Guide to the Stock Exchange* (13th ed., 1801) remained for decades part of the mental furniture of many statesmen, business men, and economists:

> A number of merchants uniting and applying to the Government for an exclusive charter, to prevent others from engaging in the same commerce, and for a power to raise money by an open subscription in order to form their stock or capital are generally denominated companies.

Perhaps the earliest clear-cut exception to this widespread view came from the pen of Sir Frederick Eden,[17] one of the founders and a chairman of the Globe Insurance Company, but perhaps best known as the author of *The State of the Poor*. He severed the umbilical cord completely. "The question of policy and expediency with respect to a joint-stock company," he declared, was not connected with the question of monopoly. The exclusive privileges of the Bank of England, of the India and Hudson's Bay Companies, were not essential to a corporate body as such.

> As most of the accounts of ancient corporations are accounts of monopoly, superficial reasoners have inadvertently concluded that all joint-stock companies, even those that have no exclusive privileges (establishments of comparatively modern date) must be detrimental to the public, in preventing that competition in trade which is essential for their interest; although the obvious effect of creating non-exclusive companies, in addition to existing traders, is to add to the assortment of dealers which the public possesses and consequently to increase their chance of benefit from competition.

Thoroughly aroused by the proportions of the new movement and the character of some of the companies, the Attorney-General sought (November, 1807) a criminal information against two of

[16] In the edition of 1856 of his *Commercial Dictionary*, McCulloch was still quoting, with unctuous approval, Gibbons' diatribe against monopolies as well as the gospel of companies according to Adam Smith (art., "Companies").

[17] *On the Policy and Expediency of Granting Insurance Charters* (1806).

those recently formed[18] as schemes which violated "the express provisions and plain policy" of the Act of 1720.[19] "The only probable reason why this branch of the Statute had not been acted upon for so long," he suggested, "was because it had corrected an evil it was intended to suppress, till now of late when it had shown itself again, it was necessary to put this wholesome law into force."[20]

Alarm spread among investors and company promoters.[21] New ventures folded up. While awaiting the decision, pamphleteers examined the question of legality and sought to combat "the numerous attempts to disparage joint-stock companies" in the eyes of the public. It was absurd to suppose, declared one Philopatris, that an association of gentlemen for commercial purposes was illegal. "Are we now, in this age of civil liberty, to be deprived of commercial freedom? Are the people of small capitals to be restrained from making them productive by uniting to trade as a body?"[22] If the doctrine insisted upon as the true construction of 6 Geo. I, c. 18, were established, the many enterprises which bore no resemblance to the "extravagant" projects therein condemned would be swept away, although already permitted by the Legislature "to grow to most productive maturity." This contest, it was alleged, involved £150 million. The Attorney-General might with better wisdom introduce "such improving regulations as would, while separating those which are exceptionable, protect and encourage institutions of sterling utility."[23]

In the Court of King's Bench,[24] the question was raised as to

[18] The London Paper Mfg. Co., capitalized at £50,000, and the London Distillery Co., at £100,000. Both held forth to prospective subscribers that the liability of shareholders was to be limited by deed of trust.

[19] It is interesting to note that the *Morning Chronicle* (November 12, 1807) had published the pertinent provisions of the Bubble Act *in extenso*, "as a caution to the public against incurring its serious penalties."

[20] *Rex* v. *Dodd*, 9 East 516–27 (1808).

[21] Cf. Philopatris, *op. cit.*, and Henry Day, *A Defense of Joint Stock Companies* (1808).

[22] Arguments that were to be much used later during the final struggle for freedom of incorporation in the fifties.

[23] Day, *op. cit.*, *passim*.

[24] *Rex* v. *Dodd*, *loc. cit.*

whether or not the particular schemes denounced by the Statute as manifestly tending to the common grievance, etc., such as raising a great sum by subscription for trading purposes and making the shares in the joint stock transferable, were in themselves unlawful and prohibited, without reference to the *fact* of such tendency in that particular instance.

The Crown argued that the legislature had intended to prohibit altogether such acts described by certain *indicia*[25] as tending in their nature to the common grievance. The defendants denied any mischievous tendency in their enterprises and maintained that in the absence of such they did not fall within the compass of the Statute. This main question, however, was not decided, and the Court refused the application of the Crown's officer "not because we think the facts before us are not within the penalty of the law," but in view of the lapse of eighty-seven years since any authenticated proceeding on the Act, and of the fact that other means of prosecution were open to the Attorney-General. Lord Ellenborough, the presiding justice, pointed out, nevertheless, that no person could in the future pretend that the Statute was obsolete. Furthermore, he condemned the feature of alleged limited liability as "a mischievous delusion calculated to ensnare the unwary public." The subscribers themselves might stipulate with one another for such contracted responsibility, but to the rest of the world each partner was fully liable. Finally, he urged, "as a matter of prudence to the parties concerned, that they should forbear to carry into execution this mischievous project, or any other speculative project founded on joint-stock or transferable shares."[26]

There was hearty agreement with the Court's decision. The *Morning Chronicle*, for example, believed it to be in accord with the dictates of common sense that the present offenders should not suffer the penalties of the long-dormant statute. Moreover,

[25] (1) Acting or presuming to act as a corporate body; (2) raising or pretending to raise a transferable stock; and (3) the use of charters for purposes not warranted by them.

[26] A few months later two other associations with transferable shares were held illegal. There is no record, however, of the assessment of penalties. *Rex* v. *Buck* and *Rex* v. *Stratton* (1808), 1 Campbell 547, 549.

it felt that security to the public against "the bubble of speculations" had been provided. Still, Parliament should do something to set at rest various established societies of undoubted public merit in which not only great amounts of property were embarked but which had contracted public engagements of some thirty million pounds.[27] Parliament took no such action for many years.

Meanwhile, further litigation, although clearly indicative of the hostility and suspicion of the courts towards the new species of organization, left in doubt exactly what was legal and what was not. It remained uncertain for some years whether a company with any of the *indicia* set forth in the Act of 1720, and which was at the same time "beneficial" in object and purposes, would be sustained in event of attack.

The leading case, in Lord Lindley's opinion,[28] was *Rex* v. *Webb* (1811).[29] Indictment was sought against the Birmingham Flour Company, a concern having a capitalization of 20,000 one-pound shares. Each member was limited to twenty shares and covenanted to purchase weekly a certain amount of flour from the association. Shares could be allotted only upon acceptance of the covenant.[30] The Company was held not to be within the Statute for two reasons: first, the fact of any special nuisance was negatived by the jury; and secondly, shares were transferable to a limited extent only. Commenting upon the latter, Lord Ellenborough declared that it was impossible to say that the Act made it a substantive offense to raise a large capital by small subscriptions, without regard to the nature of the objects for which the capital was raised, or whatever might be the purposes to which it was applied. In *Brown* v. *Holt* (1812),[31] the Court seemed to doubt if it were not a question for a jury to consider whether the association were in fact beneficial, but would give no

[27] Leading article in the *Morning Chronicle* (May 31, 1808).

[28] *A Treatise on the Law of Companies*, 6th ed. (1902), p. 181. Cf. Palmer, *Company Law*, 7th ed. (1909), p. 5.

[29] 14 East 406.

[30] Cf. *Articles of the Birmingham Flour Company* (1796).

[31] 4 Taunton 587.

opinion of the question of nuisance in regard to the company in question, the Golden Lane Brewery.[32]

The following year, in *Pratt* v. *Hutchinson*,[33] no objection was held to an agreement to raise capital by small monthly subscriptions on shares transferable only with the approval of the society. A limited power of transfer was held to be "not within the mischief of the Act." Likewise, in *Ellison* v. *Bignold* (1821),[34] a voluntary association for insurance by way of mutual guarantee was or was not to be considered legal, according as the shares were or were not generally transferable to persons not members. However, in *Josephs* v. *Pebrer*,[35] decided at the height of the boom of 1824–25,[36] The Equitable Loan Bank was declared illegal as having shares transferable without any restriction and as affecting to act as a body corporate without due authority. The objects of the company, it is to be noted, were not in evidence.

Confusing litigation and the ghosts of 1720 harried the course of the unincorporated joint-stock company until the middle of the century. For even with the repeal of the Bubble Act in 1825, its legal position remained undefined and nebulous.[37] In the face of all such opposition, however, company organization advanced steadily, during the first two decades, in one rapidly developing field of commercial activity—insurance.

In 1800 there were only six life-offices in existence.[38] Three more, including the Globe, had appeared by 1806. Over the next two years, eight new companies, among them several great present-day institutions such as the County, the Imperial, and the Atlas, were founded. Some were formed to underwrite fire as well

[32] The company was described in the *Morning Chronicle* a few years before (November 24, 1807) as "not among the numerous projects of the day," having been established in 1804 and paying (in 1807) £170,000 per annum in taxes.

[33] 15 East 510.

[34] 2 J. & W. 503.

[35] 3 B. & C. 639.

[36] *Infra*, p. 38.

[37] *Infra*, pp. 41-4.

[38] Francis, *Annals . . . of Life Insurance* (1853), p. 213.

as life insurance. Of a host of others set on foot between 1808 and 1821, eight more, including the Guardian, "maintained their ground."[39] The handful of companies chartered early in the eighteenth century[40] was still doing business and, of course, possessed full corporate privileges, but none of the institutions formed from 1800 to 1824 was incorporate. They were large, unwieldy partnerships with transferable shares. Out of their necessities was forged one very important link in the evolution of the modern business corporation in England.[41] It deserves more than passing attention.

As we have already observed, several applications for charters for companies proposing to write insurance were refused in the latter half of the eighteenth century. The law officers of the Crown had unequivocally expressed their disapprobation. Nevertheless, the promoters of the Globe did manage in 1799 to secure an act to enable the Crown to incorporate them by charter,[42] although the London Assurance claimed that such a grant would infringe their rights in view of a clause in their own charter which restrained all other corporations "from making insurance."[43] However, the Crown did not act, for in 1806 the Globe petitioned for statutory incorporation. It was urged that "the businesses of Fire and Life Insurance are of such a nature, as to render the establishment of a joint Stock Company (but without exclusive privileges) perfectly reasonable, since these dealings are admitted to be of general utility, and to require a greater capital than can easily be collected into a private copartnery."[44] The company was to raise not less than £1,000,000 as capital and offered to pay £100,000 into the exchequer to be invested in 3 per cent stock as an ultimate security to creditors. Nevertheless, the bill perished in committee, where it met opposition from existing institutions on grounds of principle as well as of precedent.[45] The directors

[39] *Ibid.*
[40] *Supra*, p. 11.
[41] Cf. Clapham, *Economic History of Modern Britain*, I (1926), 288.
[42] *House of Commons Journals*, LIV (1799), 595, 715.
[43] *Ibid.*, p. 697.
[44] *Ibid.*, LXI (1806), 390.
[45] *Ibid.*, pp. 415, 430, 469.

of the Phoenix Fire (an unincorporated concern formed in 1782), for example, argued that incorporation would give a new company, "divested of responsibility and pledging only a limited capital, undue advantages over competitors whose whole independent fortunes stood pledged."

Incorporation denied,[46] a compromise was effected. To overcome one of the most serious legal difficulties obviously inherent in a partnership with perhaps many hundred shareholders, several of the companies applied to Parliament for legislation to enable them to sue and be sued in the name of a principal officer, usually their secretary. This right—a distinct and important incident of incorporation—was extended to five insurance companies by a series of acts passed in 1807.[47] By 1815, fifteen more had secured the privilege; and also, it may be noted, a copper-mining company.[48]

As a result of the monopoly granted in 1720 (under a provision of the Bubble Act), two companies only, the Royal Exchange and the London Assurance, had the legal right *qua* companies of effecting marine insurance, although actually the amount of their business was insignificant in comparison with that placed with the individual members of Lloyd's.[49] The Committee on Insurance of 1810 found, however, that upward of twenty associations had been established in different parts of England, in violation of

[46] The experience of the Globe well illustrates the tortuous road to incorporation. In 1805 the Treasury was memorialized for the second time. The following year a committee thereof agreed to submit an act to the legislature. A draft was presented to the Treasury; transmitted to the Privy Council; submitted to counsel; approved and returned to the Treasury; introduced and read a second time in the House of Commons; referred to a committee and—to oblivion. Cf. Eden, *op. cit.*, *passim.*

[47] That of the Globe Insurance Co. was the first (47 Geo. III, L. & P., c. 30) (1807). The others were similar. I find seven before the series of acts passed in 1810, from which date Clapham dates the movement (Clapham, *op. cit.*, p. 288). Some 100 of them, not including Supplementary Acts, were passed from 1801 to 1844 according to Shannon (cf. "The Coming of Limited Liability," *Economic History* [January, 1931], p. 274). "The policy of Acts of Parliament, in such cases," the Lord Chancellor (Eldon) declared in *Davis* v. *Fisk* (1823), "was to render facility to justice by making one person to represent a mass, which would itself be immovable" (cf. *infra*, p. 83).

[48] Birmingham Mining & Copper Co. (54 Geo. III, L. & P., c. 46).

[49] Six out of a total of £162.5 million. Cf. *Report of the Select Committee on Insurance, P. P.* (1810), II.

the rights of the existing companies, to underwrite risks on vessels owned by the members of each association. In recommending abolition of the century-old monopoly, the Committee cited Adam Smith for their purpose and pointed out that he made an exception of insurance, "though unfriendly to joint-stock companies in general." Furthermore, the superiority of company organization for "facility, security, and cheapness" appeared "from the concurring testimony of all the merchants examined."[50] It was also to be inferred from the fact that in all other countries company organization was invariably found in the business of marine insurance.[51]

Nevertheless, the Committee's findings were not implemented. The members of Lloyd's rose up in arms[52] and were successful in their efforts to prevent the incorporation of the proposed Marine Insurance Company. Their spokesman in the House of Commons, Joseph Marryat (the father of Captain Marryat), voiced the view that their fifteen hundred members were equal to every possible business demand. Emphatically, companies should not be permitted to do what was already well done by individuals. Was not Britain's unexampled prosperity due to "the competition of individual exertions"?[53] Companies would effectually destroy individual enterprise. The Committee had recommended "the exploded system of joint-stock companies."[54] The Abbé Morellet's list of defunct companies[55] had been compiled in vain.

[50] *Ibid.*, p. 9.

[51] See the evidence of J. Jones, secretary of the Phoenix Fire Office, who had found nineteen incorporated insurance companies in Massachusetts alone.

[52] Cf. *A Letter to Jasper Vaux*, by a subscriber to Lloyd's (1810). The author of this tract did not share the almost unanimous opinion of other members. He made the interesting contention (pp. 59–62) that unincorporated companies (of which he did not disapprove) were inferior on grounds of public policy to those duly chartered inasmuch as the legislature would have the right, in the case of the latter, to stipulate the amount and the investment of the capital; to define the objects of the company; to revoke the charter in the event of "public mischief." In short, companies established with the sanction of the law were to be preferred to those existing only by its sufferance (and a doubtful sufferance at this period [cf. *infra*]).

[53] *Speech by Joseph Marryat, M.P., on Marine Insurance*, reprinted by Lloyd's (2d ed., 1810).

[54] Joseph Marryat, *Observations on the Report of the Committee on Marine Insurance* (2d ed., 1810).

[55] Cf. *The Wealth of Nations, op. cit.*, II, 246.

In the course of his attack, Marryat read a long lesson to the House out of Postelthwayt's account of the Bubble period[56] and declared that the legislation of that day "recognized as a general principle that *all* joint-stock companies tended to the common grievance." Furthermore, exemption from responsibility beyond the amount of invested capital was an exclusive privilege fraught with dangerous consequences:

> If a company should at any time become insolvent, the individual members would still remain in affluence and be driven in their coaches by the persons ruined. . . If this scheme is carried into effect, the shares of the company will rise to a price far beyond their value, the present proprietors will avail themselves of the public credulity and sell out . . . the company will fall into the hands of adventurers, the bubble will shortly burst to the ruin of thousands. . . If this company obtains the sanction of Parliament, the rage for these undertakings will be rekindled . . . all the evils of 1720 will be repeated.[57]

Repeal of the marine-insurance monopoly was thus delayed until 1824.

Two further controversies of the period are worth brief mention. In 1800, when Parliament debated the incorporation of the London Company for the Manufacture of Flour, Meal and Bread,[58] Tierney vigorously opposed the measure on the ground that "those incorporated could lose only their share of £25 each while their competitors might lose all," speculation would arise, the shares would find their way into a few hands, and thus enable the company to set a monopoly price upon their commodity.

[56] *Dictionary of Commerce* (1751).

[57] Hansard, *Parliamentary Debates*, XV (1810), 494–95.

[58] Commonly known as "Lord Liverpool's scheme." It was capitalized at £150,000. Cf. *An Appeal for the Poorer Millers and Bakers*, by an Attentive Observer (1801). The author remarked that the concern united by charter "what it has been the care and wisdom of the ages to keep separate, *viz.*, the three trades of corn merchant, miller and banker,—a proceeding which the manhood of commerce spurned and trod underfoot, and which the *dotage* [italicized in original] of commerce alone would have sustained." Under a provision of the Act incorporating the company (39/40 Geo. III, c. 97), annual accounts were to be filed with Parliament (cf. *P. P.*, [1801], *sqq.*). There were other concerns of like purpose (though without any charter) such as the Albion Mills Company and the Birmingham Flour & Bread Company (*supra*). They were held up later as indicative not only of favorable legislative opinion towards joint-stock companies, but also as proof that a company need not of necessity involve monopoly (cf. Day, *op. cit.*, pp. 58–9).

On the other hand, in discussing the proposed charter of the Gas Light and Coke Company (1810), Lord Sheffield declared that the objections to limited liability could not be taken seriously without altogether sacrificing the main purpose of the measure. It was socially expedient to form companies "to carry on great undertakings requiring large capital and a steady perseverance not dependent on the exertions or life of an individual." Unless the very numerous subscribers were exempted from "the usual operation of the bankruptcy laws, the undertaking must fall to the ground."[59] Such exemption, Brougham had argued, would set individuals "free from the control of anxious economy in management." A corporate body could not possibly serve the public with gas light to more advantage than individuals, nor was the necessary capital beyond their range, urged a Lancashire mill-owner. James Watt (of Boulton & Watt) thought that competition would be destroyed. He even declared: "I should get out of business as soon as possible," if such a body were to be set up.[60] In Parliament the project was stamped by Wilberforce as "one of the greatest bubbles ever imposed upon public credulity."[61] After initial defeat the company was finally chartered in 1812.[62] Its shares were included in the Stock Exchange price-

[59] Hansard, XVII (1810), 230. In extenuation, he felt called upon to point out that the petitioners sought none of the monopolistic privileges objected to "in the old charters." The promoter had drawn attention to the fact that every patentee was limited by the patent law to five co-partners only. Cf. F. A. Winsor, *A National Light and Heat Co.* (1806).

[60] Minutes of Evidence before a Committee on the Gas Light & Coke Co.'s Bill, *P. P.*, III (1809), 220, *passim*. Cf. J. Van Doorst, *An Address to Proprietors of the Intended Gas Light & Coke Co.* (1809). Watt's views may have been influenced by his failure in 1784 as one of the promoters of the Albion Steam Flour Mill, mentioned above, to secure a charter of incorporation for the enterprise from the Crown. (Cf. O. A. Westworth, "The Albion Steam Flour Mill," *Economic History*, II [January, 1932], 383). At any rate, he then met from the milling interests of London the kind of opposition he now made against the proposed lighting company.

[61] Hansard, XIV (1809), 860–61.

[62] 50 Geo. III (L. and P.), c. 163. Cf. *An Account of the Gas Light & Coke Co., by an Associated Proprietor* (1817). In the Lords, one amendment containing the germ of many similar subsequent provisions in the interest of shareholders was added. It required that no dividend should be paid whereby the capital would in any degree be reduced or impaired, and the directors were made personally liable to creditors and shareholders for any consequent injury (cf. Clifford, *op. cit.*, I, 209).

list by 1819.[63] "Out of the passion for joint-stock trading," wrote the authors of a manual for tradesmen published in that year, "have arisen some of the most beneficial and advantageous undertakings that this or any other country has to boast . . . Assurance . . . stands foremost in the list of Trading offices. [However], the Docks, Canals, Gas and Brewery Concerns are all public establishments in which shares are to be obtained occasionally . . . Waterworks companies we should not omit if they were still open to receive new shareholders. But they are all daily devolving into snug Corporations by means of monopoly and coalitions."[64]

The debates in Parliament thus reveal not only legal and mercantile opinion hostile to legislative limitation of liability; they reflect as well serious public concern over the difficulty of fixing the responsibility of shareholders in an unincorporated company in the event of financial embarrassment. That this was no idle concern is clear from a forceful argument for the limitation of liability that came from a protagonist of the insurance companies[65] which, as we have seen, were without full corporate privileges. The principle of personal responsibility, "the *magna charta* of sellers," was well adapted, he urged, to "a state of society in which traffic can be carried on by individuals or partnerships" of a few members. "For the more extended operations of commercial adventure," however, "new modes of forming contracts" were necessary. Particularly in insurance, where credit is in fact given by the buyers, by persons who could not be supposed to have the means of appreciating the solvency of a large number of partners, personal responsibility would afford inadequate security, "ill calculated to provide for remote contingencies." As a result of private reverses, the personal resources of the shareholders might well disappear before the accrual of the risks insured against. Thus, personal responsibility might masquerade as "the capital of pennyless adventurers."

[63] Duguid, *op. cit.*, p. 96.
[64] *The London Tradesman*, by Several Tradesmen (1819), pp. 312 f; 319.
[65] Eden, *op. cit.*, *passim*.

Yet, the author pointed out, in various undertakings Parliament or the Crown had (by charter) "substituted a known fund in the room of unlimited responsibility." The incorporation of insurance companies would, by providing such a fund, make the position of their creditors much more secure inasmuch as:

1. The joint-stock fund is susceptible of regulations by which its amount may be periodically ascertained and made known, not only to its proprietors but to its customers. Its accounts can be subjected to an undisguised publicity. On the contrary, the amount of a personal responsibility fund can never be known.
2. The joint-stock fund of an insurance company is peculiarly answerable for their contracts; it is exclusively appropriated to their use and cannot be affected by the private dealings of individuals composing the body corprate. Quite the reverse with partnership societies.

For many years, however, industrious promulgation of the doctrine of unlimited liability[66] and enforcement of the law whenever opportunity arose[67] were powerful expedients used to discourage, if they did not succeed in stifling, the new form of business organization. As a correspondent of the *Morning Chronicle* protested:

> The common law of the land has wisely provided that *all* and *each* of the partners in a trade shall be answerable for the whole debts of the concern to the last shilling of his property. . . All the subterfuges and expedients that have been resorted to by plausible solicitors, of introducing clauses into deeds of settlement by which the partners are not answerable beyond the amounts of their respective subscriptions, are laughed at by real lawyers and would be scouted at by a protecting judge. . .
>
> What an argument is this, Mr. Editor, for reflection before you enter into these speculations, and for prudence and economy in their management after you are engaged![68]

In the course of a leading article, *The Times*[69] remarked a few years later:

[66] Cf. Powell, *Evolution of the Money Market* (1915), chap. vi, *passim*.

[67] *E.g.*, the *Annual Register* (1827), p. 53, commented as follows on a current case in the Court of Common Pleas (*Birks* v. *Hart & Findley*), in which an action was brought by a tallow-chandler against two shareholders in the London United Mining Co. to recover £173, the value of goods supplied for the use of the company: "The defence set up was that the action should have been brought against the Directors, who had given orders for the goods. The Lord Chief Justice, who in this sort of case shows that he looks more to merits than technical sophistry, decided that the plaintiff was entitled to recover from any of the shareholders or partners in the joint-stock concern."

[68] Letter from "A Plain Dealer," (November 16, 1807).

[69] May 25, 1824.

Nothing can be so unjust as for a few persons abounding in wealth, to offer a portion of their excess for the formation of a company, to play with that excess—to lend the importance of their whole name and credit to the society, and then should the funds prove insufficient to answer all demands, to retire into the security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.

Indeed, as John Austin wrote in 1825, "compared with this rule of the existing law, the mysterious terrors of the unintelligible Bubble Act were a feeble obstacle to the establishment of joint-stock companies."[70] Or as it was said several decades later, "no prudent man can, with the present law of partnership, like the sword of Damocles suspended above his head, invest his surplus in any business that he cannot himself practically superintend."[71]

The new quasi-corporate company was, nevertheless, one of the main lines of advance[72] towards freedom of incorporation. In the period we have discussed it had begun to establish itself between the old common-law partnership, on the one hand, and the corporation, strictly speaking, on the other. Unable to arrest, Parliament was eventually to regulate this vehicle for the attraction and employment of the capital of investors who took no active part in management; and, still later, "by a sort of legislative hocus-pocus," as McCulloch put it,[73] "such associations were to be metamorphosed into corporations." First, however, the unincorporated company had to weather several more eruptions of reckless promotion. We pass to a discussion of the first of these, the great company boom of 1824–26.

[70] "Joint Stock Companies," in *Parliamentary History and Review* (1825), p. 711.

[71] Cf. Woodforde Ffooks, *The Law of Partnership an Obstacle to Social Progress*, London (1854), pp. 9–10. For an opinion in identical words, see testimony of the representative of the Liverpool Chamber of Commerce before the Royal Commission on Mercantile Law, 1854 (*First Report, P. P.*, XXVII [1854], Evidence, pp. 221–2).

[72] Cf. T. B. Napier, in *A Century of Law Reform* (1901), p. 381.

[73] *Encyclopaedia Britannica*, XVII (8th ed., 1859), 317.

CHAPTER III

THE CRISIS OF 1825 AND ITS RESULTS

The years 1824 and 1825 witnessed a veritable avalanche of extravagant promotions and general speculation—"bubble schemes came out in shoals like herring from the Polar Seas."[1] In fact, the stage had been set for a wave of business expansion. Following the collapse of the prosperity of the Napoleonic years, deflation had completely run its course. Capital was abundant[2] and rapidly increasing, no longer heavily taxed and absorbed by war expenditure.[3] Relieved of the burdens of war finance, it inevitably sought new channels of investment. Low interest rates[4] gave evidence of monetary ease indeed, "money was quite a drug,"[5] and "the long leashed hopes of the business community were ready to spring at any game that offered."[6]

The speculative movement seems to have had its inception in foreign loans,[7] more particularly, in loans to the new governments of South America. For some years past, it is true, the British investor had been familiar with the securities of the more stable governments of Europe.[8] Since the peace, "the operations of the traffickers" had on the whole been successful.[9] Capital

[1] Letter to *The Times* (April 20, 1826).
[2] Cf. *Annual Register* (1824), pp. [2] ff.
[3] Smart, *Economic Annals*, II, 187.
[4] Tooke, *op. cit.*, II, 148–49.
[5] Cf. [John Wade], *Digest of Facts and Principles on Banking and Commerce* (1826), pp. 66 ff.
[6] Jenks, *The Migration of British Capital* (1927), p. 52. Cf. leading article in the *Morning Chronicle* (December 9, 1824): "The current rate of interest being low, monied men are eager to embrace any scheme which promises a fair return for the capital invested."
[7] *Remarks on Joint Stock Companies by an Old Merchant* (1825), p. 45.
[8] Cf. *Circular to Bankers*, Edited by Henry Burgess, (January 13, 1832).
[9] *Remarks, op. cit.*, p. 44.

had been flowing to the Continent in large amounts;[10] *rentes* paid better interest than Consols, as Rothschild had declared to a Parliamentary Committee in 1819.[11] Recently, furthermore, Consols had steadily risen in price until they yielded but a very small return.[12] Indeed, by February 1825, 2¼% Exchequer Bills were at a substantial premium,[13]—stale, flat and unprofitable. "Let any one with a spoonful of 'the milk of human kindness' in his composition," wrote one *Leguleius* in a letter to the *Morning Chronicle*,[14a] look at the prices of the Public funds, yielding barely three per cent, with a prospect of a further reduction of the interest should the peace continue and of the principal should war break out; or let him try to invest it on mortgage at a higher rate than three and one-half per cent on what can be deemed unexceptionable security; or even to buy leasehold property for any decently long term, and at a price paying a reasonable interest, and he will surely find some milder term than 'a spirit of gambling' by which to characterize the wish of individuals unused to business, of limited income and small capital, to embark their slender means in something that without trouble to themselves will pay a living interest and yield some hope of an increase to the principal."

It is not surprising, then, that eyes turned eagerly to the higher rates offered by the debts of the new South American states whose position and prospects were being fanned into glowing prominence by highly colored propaganda. In the two years

[10] Hobson, *Export of Capital* (1914), p. 101, gives a list of foreign bond issues and the amounts raised thereon in England, 1820–25, quoted from *Statistical Illustrations of the British Empire*, London Statistical Society, (1827). Jenks (*op. cit.*, p. 356) has estimated that to the end of 1825 investment in continental stock amounted to £57 million.

[11] Cf. *Report of Select Committee on Resumption of Cash Payments*, *P. P.*, III (1819), Evidence, p. 158; and Jenks, *op. cit.*, p. 41.

[12] Five per cent stock had been converted into four in 1822 and into three per cent in 1824 (Tooke, *loc. cit.*). The rate of interest had fallen nearly a third in 1823 as indicated by the rise of Consols from 73½ on April 3, 1823 to 94½ on April 2, 1824 (cf. *Digest of Facts*, *op. cit.*, p. 66.).

[13] Baring in the House of Commons (Hansard, XIV, 222).

[14] April 1, 1825. Similar sentiments had been voiced in the House of Commons in March, when joint-stock companies had become a matter of almost daily debate. Cf. Hansard, XII, 1071.

1824 and 1825, £17.5 million were extracted with ease from the pockets of British investors on account of these South American loans.[15] The "infatuation" spread to foreign mining ventures. "The mines of Mexico" was a phrase which suggested unbounded wealth to every imagination.[16] Early in 1824, three companies were successfully floated: the Real del Monte Association, the United Mexican, and the Anglo-American. Several more soon followed to exploit dreams in Chile, Peru, and La Platte. Three companies were organized to turn to account the "immense mineral wealth of Ireland, which was almost unknown"![17]

The fever soon spread to projects at home. In February, the Barings and Rothschilds promoted the Alliance British & Foreign Life & Fire Insurance Company. Its success on the Exchange was immediate, indeed, sensational,[18] the shares commanding at once a high premium.[19] Other promoters were quick to imitate. A host of domestic schemes, launched by prospectuses[20] which contained "a large infusion of public spirit and regard for the public good,"[21] followed in rapid succession. Parliament was besieged with applications which sought some measure of legislative sanction or privilege for joint-stock enterprises: loan and investment, insurance, and mining companies; public works of various kinds: gas, canal, dock, and bridge companies. In March[22] there were thirty, by April[23] two hundred and fifty of such private bills before the House of Commons.

[15] *Annual Register* (1825), p. 48#. In 1851, G. R. Porter (author of *Progress of the Nation*) gave it as his opinion to a Parliamentary Committee that "there would not have been such masses of money sent to South America immediately after the War if persons could have invested their money in England without incurring a risk of losing every shilling and acre. . . The law of England said that they should not risk a portion of their fortune without risking every farthing. . . They were not unwilling to throw it away in South America because they did not dare to risk it in England." Cf. *Report Select Committee on Law of Partnership* (*P. P.*, XVII (1851), Evidence, Q. 1507, Appendix, p. 163.)

[16] Cf. *Annual Register* (1824), p. [2].

[17] Smart, *op. cit.*, p. 187.

[18] Cf. *Morning Chronicle* (March 18 and 24, 1825).

[19] 15% on March 18, 20% on March 24, 1825 (*Morning Chronicle, loc. cit.*); also, Tooke, *op. cit.*, p. 150.

[20] Of which there are voluminous files in the British Museum Library.

[21] *Remarks, op. cit.*, p. 50.

[22] *Annual Register* (1824), *loc. cit.*

[23] *Gentlemen's Magazine*, Vol. 94, pp. 364 f. (1824); cf. Smart, *op. cit.*, p. 188, and *infra*.

The field for speculation steadily widened. Gambling on small installments paid down on the shares of companies, many of which existed only on paper, became widespread. With a small rise in the price of the shares, subscribers who had made a deposit of only two, three or five per cent could reap large profits in proportion to the amount actually invested. For example, if shares having a par value of a hundred pounds, of which five pounds had been called, rose to a "premium" of forty pounds, a speculator would net a profit equal to eight times the amount he had advanced. The bait proved irresistibly tempting.[24]

Meanwhile, Parliament was not by any means blind to current developments. Company enterprise and speculation encountered sharp challenge and stern resistance. Early in May, Huskisson voiced strong objection to legislative incorporation unless charters were first regularly obtained from the Crown, for only then was revocation of privileges possible in event of abuse. He was especially opposed (at this time) to the limitation of liability, "to taking every wild and idle speculation out of the general operation of the laws of the country." Angry inquiry as to how far shareholders were to be liable, he quieted with a promise that future bills extending privileges, at least to any insurance company, must contain specific clauses setting forth individual responsibility.[25] There was no objection to granting power to sue

[24] *Annual Register, loc. cit.;* cf. Gurney's speech of March 25, Hansard, XII, 1283 f.

[25] Hansard, XI, 608 f.; 842 f. *The Times* (May 25, 1824) commented with approval: "The requirement will probably diminish the number of incipient insurance companies, but will increase the security and respectability of those which shall be established". However, shortly afterwards, in the debate on the repeal of the insurance monopoly (Hansard, XI, 1088), Huskisson objected to a proposal which would have voided the attempt which insurance companies were now making to contract out of unlimited liability by inserting in their policies a clause which gave the insured a claim only against "the joint-stock fund" and absolved shareholders from further liability. He was opposed to any such "interference with private contracts". Babbage writing in the same year (1824) declared: "It will scarcely be credited some few years hence that well informed persons seriously questioned whether, if two parties entered into a written agreement . . . the one to purchase, the other to contract a certain limited responsibility . . . the law might not interfere and compel the one to incur a greater responsibility than the other has paid for" (cf. *A Comparative View of Institut'ons for the Assurance of Lives* [1826], pp. 22–4). That others than insurance companies were casting about for like means of immunity is evident from statements in several prospectuses of the period, *e.g.*, that of the South Wales Mining Company (1825): "As between

and be sued collectively, however. Debate on the bill to incorporate the West India Company evidenced prejudice against any company *qua* company, against any but "individual" enterprise, in particular. As one Member inquired impatiently, "how could a company possibly carry on the business of plantations better than individuals?"[26] Coincident with the appeal of individual pawn-brokers against the projected Equitable Loan Company, Hobhouse declared that if its bill were carried, "there was no reason why joint-stock companies of butchers and bakers should not be established."[27] Deeper fears agitated others—Lords Redesdale and Westmoreland were apprehensive lest the creation of so many companies prove dangerous to the Constitution![28]

The Lord Chancellor (Eldon) fulminated against those who "speculated on obtaining a charter" and in advance sold shares in companies likely to become "an intolerable nuisance and a source of systematic fraud."[29] He proposed to bring in a bill to require the names of partners to be enrolled in the courts; to give power to sue any two of them and to take execution; and to make members liable until notice of their withdrawal from a company were filed.[30] Lauderdale, in an effort to provide against "the mischief now going on," to take care that companies should not be incorporated without first giving assurance of having adequate

themselves the proprietors are not liable beyond the amount of their respective shares . . . and in order that no proprietor may be liable as between the company and the public beyond the amount of his shares, the Board of Directors shall on all practicable occasions cause contracts on behalf of the company to be made with that stipulation." The British Fishing Company (1825), in order to achieve the same purpose, undertook also that every purchase of merchandise should be made "for ready money only." These various expedients are discussed further in Chapter V, *infra*.

[26] Hansard, XI, 609 ff. For similar opinion on the flour trade, see *The Times* (September 14, 1826). In 1825, the fish curers were "in arms from one end of Scotland to the other" over a proposed joint-stock fishing company. Their memorial to the Board of Trade declared that it "could never be successfully carried out in competition with the exertions of private individuals" but before inevitable failure it would cause much injury (cf. *Board of Trade Papers* [hereafter cited as *B. T.*], 1/209).

[27] Hansard, *op. cit.*, p. 1339.

[28] *Ibid.*, p. 791, *re* the bill of the General Gas Company.

[29] *Ibid.*, p. 1456.

[30] *Ibid.*, pp. 856; 1076; 1100.

capital, secured additions to the standing orders of the House of Lords which required that, except in the case of turnpike, canal and like companies, no bill should go to a second reading until three-fourths of the capital of the proposed enterprise had been deposited with a public trustee.[31]

Despite these protests, the manufacture of promotions went on apace without benefit of Parliament. The "foray on public gullibility"[32] gathered momentum. "Individuals of every description . . . princes, nobles, politicians, placemen, patriots, lawyers, physicians, divines, philosophers, poets . . . hastened to venture in schemes of which scarcely anything was known except the name."[33] *The Times*, consistently over several decades an outspoken foe of joint-stock enterprise in general and of stock-jobbing in particular, was roused to biting sarcasm:

> A pleasing variety of joint-stock companies, founded of course most disinterestedly for the public advantage, have arisen of late years like exhalations: there has been a Bread Company, a Beer, a Pawnbroking, a Washing-by-Steam, a Stove-Grate Company, and many others, none of which need to be now mentioned, excepting the Alderney Milk Company, the last born offspring of monopoly. This nutritious society professes to purvey the vaccine beverage in an undiluted state; and diffident of the absolute uncorruptness of its yoke-bearing agents, sends them forth furnished with pails, under the security of lock and key, so the fluid can only be drawn off by means of a tap. It appears that the directors are persons of whom it cannot be said with truth—
>
> 'Their souls proud science never taught to stray
> Far as the Solar Walk or *Milky* Way'.
>
> In this age of science, we may fairly soon expect to find milkmen with F. R. S. appended to their names, and cheese-mongers and tapsters who:
>
> 'Can tell by sines and tangents straight,
> If cheese or butter wanted weight:
> And by geometric scale,
> Can take the size of pots of ale!'[34]

By December and January, when the boom seems to have reached

[31] *Ibid.*, p. 1339.
[32] *Digest, op. cit.*, p. 81.
[33] *Annual Register* (1824), p. [3].
[34] November 6, 1824.

its high mark,[35] "day after day teemed with successive projects."[36] "The town was inundated. . . All trades and professions were scrutinized to discern if peradventure they might not afford some basis upon which to build the goodly edifice of a joint stock company." There was a "vague, indefinite and feverish expectation of magnificent results to be produced by the advance of science," the country "was thought to be on the eve of unexampled improvement in trade, science and finance."[37]

The "guinea-pig"[38] (or "decoy") director made his appearance in force. Influential and ornamental names were "borrowed or lent" for the purpose of making an imposing prospectus. On the same list of directors were to found "men of every rank and profession—Whigs, Tories, Radicals, Saints—from dustmen up to peers of the realm."[39] Perhaps the first "directory of directors" ever published was that which appeared in *The Times* on February 7, 1825. There were one hundred and twenty-nine names,

[35] Prices of mining shares, in particular, rose to absurd heights; for example:

	Par	Paid-Up	December 10	January 11
Anglo-Mexican.....	£100.	£10.	£33. premium	£158.
Colombian.....	40.	10.	35. "	155.
United Mexican.....	100.	10.	19. "	82.

(Adapted from *Annual Register* [1825], p. 3.)

The shares of the Liverpool & Manchester Railway, which did not succeed at this time in getting corporate privileges, sold at a premium of 40 guineas in December. Cf. City Article, *Morning Chronicle* (December 4, 1824).

[36] In December, there were 16 new promotions; in January, 68. Cf. *Remarks, op. cit.*, p. 28.

[37] *Ibid., passim.* The prospectus of the Kentish Railway Company (1825) may be quoted in illustration: "The application of steam to loco-motive and stationary machines, for the conveyance of passengers and goods will give a new and extraordinary impulse to the industry of the country. Reducing the cost of transporting and exchanging commodities has an effect upon agriculture and manufactures precisely analogous to that which would be produced by improving the quality of the soil or increasing the skill and energy of the workmen." The *Morning Chronicle* (December 9, 1824), remarked prophetically: "We shall not be surprised to see this same power (steam), conducting the immense traffic between Liverpool and Manchester, Edinburgh and Glasgow, Birmingham and London."

[38] Babbage used the epithet in *On Assurance* (1826), p. 53. It has persisted; cf. remarks of Mr. Baldwin quoted in *The Times* (November 14, 1928).

[39] Letter to *The Times* (April 20, 1826).

each of which had been advertised as director of more than three companies. The list[40] included twenty-eight members of Parliament. Towards the end of the year, *The Times* was lamenting "the leprous infection of avarice which had seized noblemen who used for the most part to be men of high spirit, country gentlemen, who if not very enlightened were as sound in principle as the Constitution, and merchants, formerly but another name for integrity."[41]

The King's Speech at the opening of Parliament in February was supercharged with optimism: "There never was a period in the history of this country when all the great interests of the nation were at the same time in so thriving a condition."[42] Nevertheless, some weeks later, the Prime Minister felt called upon to issue a warning. A "fury for companies" had taken possession of the people. Those who were involved could not look to the Government for any bill of relief in event of distress consequent upon the speculation spread over the country.[43] Lauderdale, as well, urged his colleagues to take steps to "stem the torrent." Indeed, for several months *Hansard* fairly bristles with acrid debate on joint-stock enterprise. One member caustically advised "gentlemen to keep their money against a rainy day rather than invest in companies to bring salt water from Bognor, air from Heaven, and blasts from Hell."[44] Objection was even made to the grant of the right to sue collectively, for promoters might then hold out to the public something like Parliamentary sanction.[45] Huskisson reiterated his position of the preceding session. Apart from withholding limited liability, the legislature could not interfere. The House could not undertake to distinguish good from bubble projects; the public must decide. As for

[40] Hansard, XII, 1065.

[41] November 5, 1825. In August, one John Hale, carpenter, appeared as senior director of the London & Gibraltar Steamboat Co., "a fact", said *The Times* (August 16, 1825), "worth a whole session load of Acts of Parliament for opening peoples' eyes. If the mania for joint-stock companies is ever to be put out of countenance, it must be by opinion, not by law."

[42] Hansard, XII, 1.

[43] *Ibid.*, p. 1194 f.

[44] Hansard, XII, 612.

[45] *Ibid.*, p. 718.

the law, one existed which bound companies for any violation.[46]

In truth, the Act of 1720 was still to be reckoned with.[47] Decisions and dicta from the bench as well as the declarations of the Lord Chancellor from his seat in the Legislature now placed a damper on speculative enthusiasm and created decided uneasiness, at times, indeed, consternation among promoters and investors. Parliament had no more than opened when the Equitable Loan Bank[48] was declared illegal as a company having freely transferable shares and affecting to act as a corporation without authority. Shares had been issued in anticipation of obtaining an act of Parliament for the government of the society. All contracts for the sale of shares under such circumstances were declared void. Another circumstance, attending the issue of the shares (on which only one pound had been paid) was their sale at a premium of over five pounds. This widely prevalent practice called forth severe condemnation from the Chief Justice: its "necessary effect was to introduce gaming and rash speculation to a ruinous extent."

The Lord Chancellor had also repeatedly denounced such practice.[49] Now, "tasking his ingenuity and legal subtlety to frame a panacea for the grand disease of England,"[50] he reiterated his intention of introducing a bill to prevent the sale or transfer of the shares of *any* joint stock company until it had received the sanction of a charter or an act of Parliament.[51] Furthermore, from the bench, he intimated that companies of *all* descriptions were illegal unless so sanctioned.[52] In consequence, dealers be-

[46] *Ibid.*, p. 1075.

[47] As if to ward off evil, the following statement was prominently inserted in scores of current prospectuses: "The company shall not assume to act as a corporate body, or in any other manner contrary to law." Cf. the prospectus of the British Iron Company (January, 1825).

[48] *Josephs* v. *Pebrer, loc. cit.*

[49] *Supra.*

[50] "An obstinate inclination on the part of the people to be cajoled out of their money." Cf. *Morning Chronicle* (February 9, 1825).

[51] Hansard, XII, 31; 127.

[52] In *Eyre* v. *Everett, Walker & Co.*, as reported in the *Morning Chronicle* (February 10, 1825).

came panicky[53] and quotations melted.[54] Meanwhile, the *Chronicle* advised shareholders in unincorporated companies "to trust to the justice of Parliament rather than the denunciations of the lawyers," and not to be stampeded into sacrificing their holdings.[55] The House of Commons, at least, would never consent "to tieing up the hands of the people from associating" and disposing of their interest as they pleased.[56] In fact, the threatened bill did not appear, for the Chancellor was called upon to sit in his judicial capacity and therefore refrained from declaring, in his legislative capacity, what the law ought to be. In Parliament he finally concluded that "parties had enough to fear from the law as it stood."[57] In one current case involving a concern with several hundred partners, he had observed that the very impossibility of effective suit under such circumstances was a strong argument to prove the company illegal.[58] In the Real del Monte case, he threw out the suggestion that assuming to act as a corporation, even if not within 6 Geo. I, was illegal at *common* law. Stock-jobbing was an indictable offense. Persons who sold shares might be ordered to refund the money. Indeed, were not companies taking away from individuals "the power of exercising themselves in trade?" Was the time not approaching when people "would neither be allowed to eat, to drink, or wear clean linen," except upon terms which companies imposed? How could the power of directors to call for "millions and millions of money" be "consistent with the public credit?" Could tendency to the common grievance possibly be doubted?[59]

In the eyes of the editors of the *Chronicle*, Lord Eldon's dicta did not justify revision of their view that the Chancellor's opinions, "as a Politician, were seldom worth much." For obviously

[53] *Ibid.*, City Article (February 7, 1825). Some of the best houses declined to deal in the shares of any unincorporated company (*ibid.*, February 9, 1825).

[54] Cf. *The Times*, (February 5, 1825).

[55] *Morning Chronicle* (February 12, 1825).

[56] *Ibid.* (February 9, 1825).

[57] Hansard, XII, 1196.

[58] *Van Sandau* v. *P. Moore, M. P., et. al.* (1825), 1 Russell 472.

[59] *Kinder* v. *Taylor, Law Journal* III (1825), 68 ff; cf. *Morning Chronicle* (March 16, 26, 30, 1825).

there were many undertakings in which associations were superior to individual enterprise. Profitableness, it was argued, would determine their proper limit. Had the Chancellor himself not indicated the corrective of all unprofitable speculation—the liability of directors and shareholders to their last shilling and acre, knowledge of which would deter all rational men from speculation? It was, further, an abuse of terms to apply "monopoly" to a company of a hundred men investing their thousand pounds apiece.[60]

The alleged restrictions imposed by the Bubble Act brought forth the following from one Leguleius:

> Let it not be imagined that speculation would be checked or fraud prevented by the total interdiction of all companies not established by charter or Act of Parliament. The speculations have been as large, and the frauds as numerous in the incorporated as well as the unincorporated associations. I know incorporated companies which have needlessly raised capita[1] and created shares, for the mere purpose of selling the latter at a premium. I know directors of them who have jobbed till their names savour in the market like a third day's fish at Billingsgate.
>
> I would conjure the Legislature not to trench upon that sacred and golden principle of political economy—not to interfere with the mode in which individuals employ, or even squander their money, not to lay restrictions upon that freedom for the paltry object of protecting those who will not use their energies or their sense to protect themselves. We are happily now beginning to shake off those well meant restraints which 'the wisdom of our ancestors' thought beneficial to encumber us. We have ceased to fetter the public press . . . We have ceased attempting to keep the country rich by preventing it from sending its spare coin abroad to buy useful commodities, . . . we have given over expecting to grow rich by foreign commerce, while we refuse to take the only return a country can give for the article we sell—we shall soon allow John Bull to buy his bread at the cheapest shop,—we are gradually destroying chartered companies and monopolies and throwing open every possible channel to the energies and enterprise of our countrymen. . . Do not let us act upon contrary principles in the case of domestic Joint Stock Companies![61]

Finally, in response to the accumulated tension within and without Parliament,[62] to the demand that doubts as to the legal

[60] *Morning Chronicle* (March 30, 1825).

[61] *Ibid.* (April 1, 1825).

[62] In March, coincident with Lord Eldon's "general exclamation against all joint stock companies" (cf. Hansard, XIII, 1021), a leading company promoter, Peter Moore, moved for repeal (Hansard, XII, 1279). Moore had been a party

status of the unincorporate be cleared away, and the fear of "absurd and monstrous penalties"[63] be removed, the Government took action. In June, on motion of the Attorney-General that "string of *non-sequiturs*,"[64] the Bubble Act, was flatly repealed,[65] as unintelligible and impossibly severe,[66] and, furthermore, as having restrained the formation of companies "established on just and equitable principles and for laudable objects."[67] Doubt as to the immediate relevance of the eighteenth-century legislation was swept away. The Attorney-General considered the common law sufficient to deal with fraudulent promotions, that additional legislation on this matter was unnecessary—"at once difficult, unwise and impolitic."[68]

Two other provisions of this statute of repeal are worth brief comment. Under common law, limited liability was an inseparable incident of incorporation.[69] Henceforth the Crown was empowered to prescribe to *any* extent the degree of shareholders' responsibility. Even so, the grant of charters continued to be very jealously guarded.[70] For another provision to the effect that notwithstanding the repeal of the Act of 1720 "the several undertakings should be adjudged and dealt with according to common law," Eldon was responsible. As we have seen, he had expressed his confident belief that to act as a corporation, not being a corporation, was an offense at common law. Much litigation had to run over the dam before this dictum, reinforced by the Chan-

in the case cited above. Cf. also, *Copy of the Bubble Act . . . Draft Bill . . . by Peter Moore for the amendment, and for the prevention of frauds in Joint Stock Companies* (1825).

[63] *The Times* (January 3, 1825).

[64] George, *A View of the Existing Law of Joint Stock Companies* (1825), p. 53.

[65] 6 Geo. IV, c. 91.

[66] For the Attorney-General's argument see Hansard, XIII, 1019 f.

[67] Cf. the recital of the bill to repeal, *P.P.*, I (1825), No. 149.

[68] Hansard, XIV (1826), 416.

[69] Cf. *Elve* v. *Boyton*, 1 Ch. (1891), 501, 507.

[70] In response to a request from one John Dumbell of Lancaster for a charter to establish a bread and flour company in London similar to that established in Birmingham in 1796, the Board of Trade replied that "if persons who may be interested think fit to apply to Parliament for an act authorizing them to sue and be sued, this Board will not oppose it; but cannot undertake to give any further countenance to the project." Cf. *B. T.*, 5/33, fol. 349; and *infra*.

cellor's great authority, lost its influence and was relegated to the limbo of dead doctrine. Despite the repeal of the Bubble Act, the courts continued to look askance at the unincorporated joint-stock association. It remained for some years a cinder in the judicial eye.

In *Duvergier* v. *Fellowes* (1828)[71] Chief Justice Best stated:

> There can be no transferable shares of any stock except the stock of a corporation or of joint-stock companies created by acts of parliament . . . The pretending to be possessed of transferable stock is pretending to possess a privilege that does not belong to many corporations . . . It is not necessary to decide whether the forming of a company with such shares is of itself, without other circumstances, pretending to act as a corporation. [It was admitted by both plaintiff and defendant that it was intended that the company in question should act as a corporation.] *Persons who without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King.*[72] [Therefore], the acting as such a corporation, without a charter from the Crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations.

In *Walburn* v. *Ingelby* (1833),[73] counsel urged that although the Bubble Act was repealed, it had been declaratory only, that therefore the company under litigation was illegal at common law and would not be assisted by a court of equity. Yet, the Lord Chancellor (Brougham) took the view that:

> To hold such a company illegal would be to say that every joint-stock company, not incorporated by Charter or Act of Parliament is indictable as a nuisance, and to decide this for the first time, no authority of a decided case being produced for such a doctrine. The clause intimating that each subscriber is only to be liable to the extent of his share is not enough to make the association illegal; such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice . . . Who ever became a subscriber upon the faith of the restricting clause would have only himself to blame.

Nevertheless, in *Blundell* v. *Windsor* (1835),[74] it was again

[71] 5 Bingham 267.
[72] My italics.
[73] Mylne & K. 61.
[74] 8 Sim. 601.

argued that an association was illegal under the Act of 1720, parties having:

arrogated to themselves a corporate character . . . made their shares assignable without any control on the part of the partners at large. (In all legal partnerships, admission of a new partner is made subject to control) . . . The Bubble Act only did what the common law did before it, except that it imposed penalties. [In the opinion of the Court:] The fair inference to be drawn . . . is that certain persons were to form a company, which might be increased to an unlimited extent, and that the shareholders were to have the power of transferring their shares, to whomsoever they pleased without any sort of control: the deed (of association) therefore necessarily represents that the persons who assign their shares would get rid of all the liabilities attached to them . . . It is clear that this could not be done. Therefore, the deed held out to the public, as an inducement to them to become partners in these imaginary gold mines [in North America], is a false and fraudulent representation that they might continue partners in the undertaking just as long as they pleased, and then get rid of all the liability that they had incurred by transferring their shares.

Not only was the company illegal on this score, but also because "it [trenched] upon the prerogative of the King, by attempting to create a body not having the protection of the King's charter."

The undertaking appears to have been a wild project, entered into by speculative persons for the purpose of deluding the weak portion of the public . . . , who too often allow themselves to be gulled by a specious scheme that holds out a prospect of gain, . . . *the more such schemes are discouraged by Courts of Justice, the better it will be for her Majesty's subjects.*[75]

However, in the following cases decided in 1843, the judges took a more liberal position. In *Garrard* v. *Hardy*[76] Chief Justice Tindal held that:

the raising and transferring of stock in a company cannot be held in itself an offence at common law: such species of property was altogether unknown in ancient times . . . the plea states no illegal mode or means by which they pretended to act as a corporation, as by usurping a common seal, or the like; nothing more is stated than their assuming the style and form of a company.

And in *Harrison* v. *Heathorn*:[77]

the raising of transferable shares of the stock of a company can hardly be said to be of itself a nuisance and grievance at common law; no instance of an indictment at common law for such an offence can be shown, the raising of

[75] My italics.
[76] 5 Man. & Gr. 471.
[77] 6 Man. & Gr. 81.

stocks with transferable shares being indeed a modern proceeding; and the very great particularity with which it is described by the statute (Bubble Act) seems to show that it was an offence created by statute only. . . . [There was no evidence] to show that the creation of these assignable shares had been productive of injury or inconvenience to members of the Queen's subjects, so as to occasion a common nuisance. [For accord, cf. *re Mexican & South American Mining Co.*[78]]

In fact, the pressure of economic development apart, it is difficult to see how Parliament consistently could have done otherwise than repeal the Act of 1720, or, on the other hand, to understand how the lawyers could logically maintain that the unincorporated association was illegal at common law. For, "from saying that organization is corporateness English lawyers were precluded by a long history."[79] Actually, quasi-corporations had been recognized in adjudged cases; *de facto* joint-stock banking companies continued to flourish in Scotland,[80] where indeed, in contrast to England, a *chose en action* was assignable at common law, and, like the unincorporated insurance societies which had received a measure of statutory recognition, were paying duty under the Stamp Acts.[81] In no case was it ever actually decided that an unincorporated joint-stock company was illegal at common law.[82]

Most of the promotions were to perish in the crisis which followed the exuberant prosperity of 1824 and 1825. An undue enlargement and abuse of credit, according to Tooke,[83] had allowed free rein to speculation in commodities as well as in shares and "independent of bills and bank notes, the money market was filled from other sources: extended credit on open account, the scrip of foreign loans, and the shares of joint-stock companies, which circulated like commercial paper."[84] In June, there oc-

[78] 27 Beav. 474.

[79] Maitland, *op. cit.*, III, 390.

[80] Cf. *infra*. In contrast to the law of partnership in England, the separate *persona* of an unincorporated trading company was fully recognized in Scottish law. Cf. Lord Colonsay, *in re Oakes* v. *Turquand*, 2 H. L. (1867), 377.

[81] Cf. Mundell, *op. cit.*, *passim*.

[82] Cf. Lindley, *op. cit.*, p. 183.

[83] *Op. cit.*, p. 154.

[84] *Digest of Facts*, *op. cit.*, p. 76.

curred a sharp recoil in the markets for both securities and goods. Interest rates had risen. There was more careful evaluation of the prospects of individual undertakings[85] and speculators were finding it difficult to pay up installments, having relied for some time on the profits accruing from a continuous rise in prices to make good on successive calls.[86] In July, the Committee of the Stock Exchange had cautioned members against dealing in shares of companies with the "respectability" of which they were not thoroughly acquainted.[87] By November, various companies, dissolved "in consequence of impediments which had presented themselves," were paying off deposit balances.[88] In December, following the failure of several private banks, panic[89] set in and the values of shares fell sixty to eighty per cent or vanished. The majority of the companies organized in the preceding two years went down in the collapse. "We were brought to the end of a South Sea year and no one could wonder at the concussion from the fall of such a water spout."[90]

Perhaps the most careful estimate of the number of new enterprises of the period was that made by Henry English,[91] published in 1827 after the collapse, and based, according to the author, on

[85] Cf. City Article, *Morning Chronicle* (September 13, 1825).

[86] Cf. Tooke, *op. cit.*, p. 158.

[87] *The Times* (July 8, 1825).

[88] *Ibid.* (November 15, 1825).

[89] For an account of the panic, cf. Francis, *History of the Bank of England* (1848).

[90] Gurney, Hansard, XIV (1826), 317.

[91] In his pamphlet, *A Complete View of Joint Stock Companies Formed in 1824 and 1825* (1827). In 1825, he had published *A General Guide to Companies Formed for Working Foreign Mines;* a second part in 1826: *A Compendium of Useful Information Relating to Companies Formed for Working British Mines.* There are several contemporary estimates of the number of promotions. By way of warning the *Gentleman's Magazine* published a list (March 1, 1825), compiled chiefly from advertisements in *The Times*, of 228 companies with an estimated capitalization of £167 million. A current theological review printed at intervals during the year "as a record of the state of the public mind" cumulative summaries which enumerated in all 748 "schemes" capitalized at £280 million (*Monthly Repository*, XX, *passim*). Cf. also *The Times* (September 30, 1825), and a tract entitled *The South Sea Bubble . . . Historically Detailed as a Beacon to the Unwary against Modern Schemes* (1825). Scathing attacks on company promotion appeared contemporaneously in the *Quarterly Review* and the *Scots' Magazine* (March, 1825). Cf. also Romney, *Three Letters on the Speculative Schemes of the Present Times* (Edinburgh, 1825).

original prospectuses in his possession. In all, 624 companies had been floated with a total capitalization of £372,173,100, as shown in Table I. Of these, only 127 continued to exist in 1827, as

TABLE I

	Capitalization
74 Mining companies	£ 38,370,000
29 Gas	12,077,000
20 Insurance	35,820,000
29 Investment	52,600,000
54 Canal and railroad	44,051,000
67 Steam (navigation)	8,555,500
11 Trading	10,450,000
26 Building	13,781,000
24 Provision	8,360,000
292 Miscellaneous	14,8108,600
624	£372,173,100

TABLE II

Companies	Capitalization	Amount Paid	Value
44 Mining	£ 27,766,000	£ 5,455,100	£ 2,927,350
20 Gas	9,061,000	2,162,000	1,504,625
14 Insurance	28,120,000	2,247,000	1,606,000
49 Miscellaneous	38,824,600	5,321,850	3,265,975
127	£ 102,781,600	£ 15,185,950	£ 9,303,950

TABLE III

Companies	Capitalization	Amount Advanced
16 Mining	£ 5,585,000	£ 400,900
9 Investment	8,550,000	746,000
20 Canal, railroad, etc.	19,135,000	393,375
20 Steam Navigation	2,927,500	79,900
43 Miscellaneous	20,407,000	799,500
108	£ 56,606,500	£ 2,419,675

shown in Table II. In a second group are those which were abandoned, but whose shares were issued and sold in the market (Table III). Third, there were 236 companies with a capitalization of £143,610,000 which published prospectuses or which were announced in the press, but which did not, so far as known, issue shares. Finally, some 143 published prospectuses or were noticed but did not specify any particulars. Their capitalization was estimated as amounting to £69,175.

As already suggested, the great majority of the promotions did not weather the crisis, and most of those that did were extinct by 1843.[92] The South American loans were eventually a complete loss.[93] Mining companies which during this period had made their first appearance in any number dropped from sight with the exception of a few foreign mines whose shares, although still quoted in the forties, were worth but a very small fraction of the amounts originally subscribed.[94] "There was an almost entire loss upon every company formed for the purpose of trading—assuming the trading and commercial functions of individuals."[95] However, there were some notable survivors. The General Steam Navigation Company, and several others proved profitable.[96]

[92] *Report of Select Committee on Joint Stock Companies* (hereafter cited as *Report of 1844*), VII (1844), Evidence, QQ. 2341 ff.

[93] Tooke, *op. cit.*, p. 159. According to *The Times* (July 20, 1826), various British foreign loans, about one-half of which were to South American countries and Mexico, had at that date a market value of only £12.3 million in comparison with an original net investment of £31.6 million.

[94] Spackman, *Statistics of the British Empire* (1843), p. 151. The following figures were published in 1835 in the *Quarterly Mining Review* (Edited by Henry English), III, 6:

Companies	Amount Paid Up 1825	Market Value 1825	Amount Paid Up 1835	Market Value 1835
Anglo-Mexican	£ 100,000	£ 1,600,000	£ 1,050,000	£ 77,200
United Mexican	60,000	930,000	1,320,000	172,000
Mexican	100,000	260,000	340,000	17,200
Real del Monte	35,000	735,000	900,000	244,000
Columbian	50,000	850,000	470,000	110,000

[95] *Report of 1844, loc. cit.*

[96] *Ibid.*

The Stockton and Darlington Railway was completed in 1825 and others projected during the period, notably the Manchester and Liverpool and the London and Birmingham, were to succeed within a decade. Of the insurance companies promoted during the period, eight maintained an independent existence and all but one were paying dividends in 1843—two marine, two fire, and six life companies.[97] The important St. Katherine docks had been built. The several gas companies were "generally remunerating."[98] Of four joint-stock banks organized in Scotland in 1825, three, including the National Bank of Scotland, were permanently successful.[99] In sharp contrast, none of the quasi-banking and investment companies in England got on their feet. Manufacturing in greater part seems to have continued outside the field of joint-stock activity.[100]

Finally, it may be noted that some 156 companies formed before 1824 weathered the crisis (Table IV).[101]

TABLE IV

Companies	Capitalization	Amount Advanced
63 Canal	£ 12,202,096	£ 12,202,096
7 Docks	6,164,590	6,164,590
25 Insurance	20,488,948	6,648,948
16 Waterworks	2,973,170	2,973,170
4 Bridge	2,452,017	1,952,017
27 Gas	1,630,700	1,215,300
7 Road	494,964	479,814
7 Miscellaneous	1,530,000	1,530,000
156	£ 47,936,486	£ 34,065,936

[97] Spackman, *op. cit.*, pp. 147-48.

[98] *Report of 1844, loc. cit.*

[99] A. W. Kerr, *History of Banking in Scotland* (ed. 1918), pp. 167–68.

[100] The *Report of 1844*, App. 5, contains a copy of the deeds of partnership, dated May 1825, of an apparently successful "company mill" for carrying on some of the processes of woolen manufacture. It had a capital stock divided into 148 shares of £25 each, not more than twelve of which could be held by any one person.

[101] English, *loc. cit.*

As was inevitable, after the crash a motion was brought before the House of Commons to order a general inquiry into the companies formed during the "mania."[102] Shattered expectations, rumors of dubious methods used[103] to obtain private acts, and suspicion of various kinds of financial sleight-of-hand and speculation in the activities of promoters and directors demanded satisfaction. Canning and Huskisson[104] took the proposal "as a sweeping censure on all joint-stock companies." The latter rose to the defense: "If there was any one circumstance, to which more than any other, this country owed its wealth and commercial advantages, it was the existence of joint-stock companies." He pointed to their success in public works of various kinds, in insurance, in Scottish banking. "There was no greater error than to cry down companies as public evils." Attwood declared that there was "no more harm in buying and selling a share, than in purchasing or selling a shawl;" the failures in mining proved nothing; joint-stock enterprise contained great possibilities in many directions. The motion was amended so as to set on foot an investigation of the affairs of only one company, the Arigna Iron and Coal Mining Company.[105]

In fact, Huskisson had recently gone beyond mere parliamentary defense of the joint-stock company. Guided in part by successful Scottish experience,[106] he had affirmed his faith in corpo-

[102] Hansard (N.S.), XVI, 243. Hume had attempted early in the boom, but without success, to secure a standing order to exclude all Members who had an interest in private bills from sitting on such committees (*Morning Chronicle*, May 27, 1824).

[103] Cf. Letter to *The Times*, December 14, 1825: "Members who compose Private Committees are too often interested . . . shares are set aside for Parliamentary friends whose vote and influence promises success."

[104] Huskisson, it may be noted, was president of the British Irish & Colonial Silk Co. established by charter in 1825. Cf. the Company's prospectus of July 30, 1825.

[105] Cf. *P.P.*, III (1826–27), 37.

[106] Cf. Hansard, XIV, 231. Apart from the three chartered banks (Bank of Scotland, Royal Bank of Scotland, British Linen Co.), seven with a joint stock had been organized before 1800; sixteen more, including the Commercial Bank of Scotland, were founded in 1800–1815. Many of these were highly successful, according to Kerr (*op. cit., passim*). By 1826 there were twenty-nine without charters, eleven of which had more than fifty "partners." The National Bank of Scotland numbered over a thousand (cf. *Return . . . of banks Established, P.P.*, XXIII [1826]).

rate enterprise in his measure for the organization of English banking.[107] As the *Quarterly Review* had inquired in 1824, whence the "happy exemption of Scotland" from banking failures? An answer, it thought, was found in Joplin: the Scotch banks were joint-stock companies, while the English were small private concerns.[108] Heretofore in England, as Lord Liverpool exclaimed, "any grocer or cheesemonger, any petty tradesman, however destitute of property, might set up a bank in any place; whilst a joint-stock company, however large their capital, or a number of individuals exceeding six, however respectable and wealthy they might be, were precluded from doing so."[109] By the Act of 1826 the establishment of joint-stock banks without limitation on the number of partners was henceforth authorized beyond a sixty-five-mile radius of London.[110] They were empowered to sue and be sued in the name of a principal officer. Limited liability, however, was withheld. Huskisson, surprisingly, would have consented to the grant of this privilege but for the pronounced objection of the Bank of England.[111] Three banking companies were formed under the Act that very year.[112]

[107] 7 Geo. IV, c. 46.

[108] *Essay on the Principles of Banking* (4th ed., 1823); cf. art., "Savings Banks and Country Banks," *Quarterly Review*, Vol. XXXI (April, 1824), *passim*. The article complained that while 273 commissions of bankruptcy had been issued against English banking concerns from 1791 to 1819, "not above three or four" failures had occurred in Scotland, and "those only in banks constituted according to the English system." For similar views expressed after the crisis of 1825, cf. *The late prosperity and the present adversity . . . explained . . . and the comparative merits of the English and Scottish Systems of banking Discussed in a correspondence between Sir J. Sinclair and Thos. Attwood*, London (1826).

[109] Hansard, XIV, 640.

[110] As *The Times* put it (July 11, 1827), the new Act "allowed of banking firms upon a rambling kind of plan, according to which half a county might become partners."

[111] Hansard, XIV, 243; Baring also, *ibid.*, p. 209.

[112] *Report of Select Committee on Joint Stock Banks, P. P.*, XXXVII (1836), App., p. 246. The following were reported to Parliament, June 29, 1827, as organized under the new Act:

	No. of Partners
Bristol Old Bank, Bristol	8
Stuckey's Banking Co., Somersetshire	10
Lancaster Banking Co., Lancaster	77
Norfolk & Norwich Joint Stock Co., Norfolk	120
Huddersfield Banking Co., Huddersfield	351

Parliament's cavalier refusal to examine the question of joint-stock companies flew in the face of wise counsel. True, the crisis which had exterminated "the great shoal of monstrous abortions —begotten by fraud upon credulity"[113] had temporarily damped down new promotions. There were men more intimately aware of underlying economic currents who perceived, nevertheless, a vital need for the deliberate erection of some sufficient legal framework not only to protect the investor but especially to facilitate the use of that now important instrument for the attraction and employment of capital, the business corporation. Gurney was insistent before the House of Commons that the government should attend to the real evil, the state of the law of partnership—to insure some measure of safety to those willing to adventure *bona fide* capital in undertakings which individual men could not encompass—and to protect the public against associations set on foot for the mere purpose of jobbing in shares."[114]

During the boom, company promoters had stormed Parliament with applications for corporate privileges, in some instances for full incorporation, in others for mere power of suit in the name of an officer. In Table V[115] it is apparent that what we should now term "public utilities" were much more successful in their pursuit of privileges than companies for all other purposes. However, there seems to have been no definite criteria upon which such private-bill legislation was based. Indeed, Austin declared that those who had the determining voice in this "occasional interference of the legislature" were "ignorant, indifferent or partial."[116] The *Morning Chronicle* had argued that the Legislature

Cf. *Account . . . of joint stock banking companies, P. P.*, XX (1826–7). The *Morning Chronicle* (April 12, 1827) gives an account of an enthusiastic public meeting held for the formation of the last named concern. It was to render impossible future crises in speculation such as the country had just experienced.

[113] *Monthly Review* (N. S.), III (1826), 26 f.

[114] Hansard, XVI (1826), 243 ff.

[115] Cf. *Monthly Review*, III, 26 ff.; *Annual Register* (1825), p. 98. The latter also gives a list of fifty applications which failed, including that of the Liverpool and Manchester Railway. From 1827 to 1832 inclusive, only twenty-one "companies" (*i.e.*, those for "other purposes") obtained privileges. Cf. *Companion to the Almanac for 1833*, p. 208.

[116] "Joint Stock Companies," *Parliamentary History and Review* (1825), p. 720.

ought to pass, not a separate law for this or that company, but a general law securing associations against inconvenience and

TABLE V

Companies for	1825		1826	
	Petitions	Passed	Petitions	Passed
Improvement of towns (water-works, gas, etc.)	104	73	68	47
Internal communication (roads, canals, railways)	146	108	105	83
Other purposes	47	11	18	6
Total	297	192	191	136

securing the public against fraudulent attempts to escape from liability.[117] In like vein, various members, including Baring, Gurney, and Grenfell, had repeatedly urged the necessity of some general measure of control to take the place of innumerable bills of exception to the law of the land, to provide a system of registration,[118] or, alternatively, even to legalize the continental *société anonyme*.[119]

The limited partnership, the *société en commandite* of France legalized in Ireland in the eighteenth century,[120] had failed of adoption in England in 1818.[121] Outside of Parliament, Austin advanced a timely, able, and farsighted brief for its introduction at this juncture. The standing rule of English law, he maintained, must perforce prevent advantageous undertakings—"The prospect of unlimited liability for obligations contracted by others

[117] March 30, 1825.

[118] A motion to compel any joint-stock company to register the names of its partners in the Court of Chancery had been defeated in 1824 (Hansard, XI, 1088).

[119] *Ibid.*, pp. 717–19, 1060, 1283 ff.

[120] In 1782, by 21/22 Geo. III, c. 46 (Irish). Upon registration, liability might be limited for a period of fifteen years. Close to five hundred such partnerships were formed under the Act down to 1830. Cf. Levi's Appendix to *First Report: Royal Mercantile Law Commission*, *op. cit.*, p. 78.

[121] Cf. Hansard, XXXVIII (1818), 22–23; *House of Commons Journals*, LXXIII (1818), 391. Cf. *infra*, pp. 81-2.

is enough to discourage a cautious man from adventuring in a joint stock enterprise . . . the rule should be abolished so as to enable partners to limit their liabilities to creditors *without* special sanction" [of the legislature].

His arguments were, in sum:

1. The rule was an unnecessary check upon improvident speculation; directors would conduct an enterprise with more or less benefit to a company in proportion to their financial responsibility . . . in the limited partnership, the responsible members would remain fully liable and mismanagement would react on them. But various classes of investors might acquire interests.

2. Creditors of such companies would not be subject to greater loss than those of enterprises constituted in the ordinary way. In any event, a simple scheme of registration would make this an accomplished fact.

3. Joint stock companies would not be set on foot in opposition to solitary traders unless they could provide commodities or services more cheaply.

The evil of the law, furthermore, was "poorly palliated by the dispensing power of the Crown . . . applications were harassed with needless vexation and unnecessary expense." The decision turned upon anything but the merits of the case.[122] Indeed, as Leguleius stated the matter: "It was an explicable instance of perversity that companies should have chosen to go on without incorporation."[123] These were advocates pleading in the wilderness, however. Freedom of incorporation was to be established only after many years of strenuous controversy.

In the matter of protecting the investor, the *Morning Chronicle*

[122] "Joint Stock Companies," *Parliamentary History and Review* (1825), *passim.*

[123] *Loc. cit.* Examination of the Minutes of the Board of Trade suggests that these criticisms were not unfounded. In 1826 charters were refused to a plate-glass manufacturing, a coal, an insurance, a loan, and a mining company, among others. In some cases the fact that the business was already carried on by partnerships "having no Privilege of Incorporation" was the ground for refusal. Two companies only appear during that year to have received charter sanction—the New Zealand Company and a London gas enterprise In both cases shareholders were subjected to double liability. Cf. *B. T.*, *loc. cit.*, and *infra.*

at the height of the boom used words suggestive of our own day: "As to *caveat emptor*, it ought not to be favored in matters of speculation."[124] English fastened upon two of the outstanding evils thrown up plainly during the period: (1) the formation of companies to take over property at a value all out of proportion to real worth; (2) the withholding of large blocks of shares for insiders to dispose of subsequently at a premium.[125] George urged a statute to restrict such practices, and especially to make the false statement of fact in any prospectus a misdemeanor.[126] But Parliament made no attempt to fetter the activities of promoters, to govern the conduct of directors, or to set up any rules of action. Another twenty years' experience was necessary to cause the erection of some sufficient legal framework. The Joint Stock Companies Act of 1844 was finally to place some degree of control over the birth and course of life of the *tertium quid* which had been wedged between the corporation, strictly speaking, and the ordinary partnership.

In sum, the joint-stock company had come by 1825 to play an important part in the organization of England's economic life. Alongside of numerous establishments upon which "the sun of royal or legislative favor" had shone,[127] a large number of quasi-corporations[128] had forged something like legal status and had achieved financial success in the face of determined legislative restriction and judicial opposition. The recital of the bill to repeal the Act of 1720 presents an interesting glimpse of current economic development:

> By reason of the increasing wealth and prosperity of this country, and of the large capital which hath been and still continues afloat and uninvested, various partnerships, associations or joint-stock companies for working for-

[124] February 14, 1825.

[125] *Op. cit.* Cf. *The Times* (July 5, 1825).

[126] *Op. cit.* (1st ed.), p. 66. This is the first specific suggestion that I have found to define by statute the contents of a company's prospectus.

[127] Cf. *Baird's Case*, 5 Ch. A. (1869-70), 734.

[128] Lord Eldon used the term in *Davis* v. *Fisk* (1823) to distinguish companies which had obtained powers of suit, etc., from Parliament. Such associations had "the power, emblems, and to a given extent the privileges of a body without having been incorporated" (quoted in a letter from George Farren to *The Times* (October 11, 1838). Cf. also, *Baird's Case, loc. cit.*

eign mines, for insuring lives and houses in Great Britain and elsewhere, for lighting England and other countries with Gas, for carrying on certain lawful trades on an extensive and lucrative scale and for various other useful and beneficial purposes have been established—not many by Act of Parliament or Charter but under deeds of partnership.[129]

In contrast with earlier centuries, the history of corporate enterprise had ceased to be that of a comparatively few great companies.

The range of commercial and industrial activity which might practically and properly be undertaken by joint-stock companies was still considered by many to be narrowly circumscribed. Prejudice in favor of individual enterprise was persistent. The *Monthly Review* wrote:

The age of companies is passed. The application of capital in masses to some splendid object beyond the reach of *individual* enterprise will always distinguish Britain. . . . But the proper occasions for such associations are comparatively rare and the principle degenerates into a pestilential abuse when it is applied to an ignorant and impertinent interference with the smaller details of trade, endeavouring to crush the humbler industry of individuals by the overwhelming power of capital *alone*.[130]

The Times held it time for joint-stock companies to go out of fashion. Most trades were likely to flourish best in the hands of private houses, not in those of corporate bodies, "which can never successfully resist the vigilance or skill of their more active rivals."[131] Limited liability, as we have seen, remained anathema to many—a heresy dangerous to the economic weal. "Company" continued in some minds synonymous with "monopoly."[132] Meanwhile, however, Englishmen did not tarry, did not wait upon the law, and the next decade was to witness continued vigorous development.

[129] *Loc. cit.*

[130] *Loc. cit.*; cf. *Lawyers and Legislators* (1825), p. 27.

[131] September 14, 1826.

[132] Cf. *supra; Monthly Review, op. cit., passim*; and *The Weekly Dispatch*, London (March 20, 1825).

CHAPTER IV

FROM 1830 TO THE COMPANIES ACT OF 1844

The next clearly defined period in the long and bitter struggle for freedom of incorporation in England is that from 1830 to the passage of the Companies Registration and Regulation Act in 1844. For some years, the crisis of 1825–26 "abated the spirit of enterprise throughout the country."[1] Indeed the *Circular to Bankers* commented in 1832 as follows: "The general absence of speculation in the commercial affairs of England is, from the extraordinary length in which it has been manifest, the most remarkable feature in the history of commerce of the present time."[2] The appetite for speculative promotions did not recover immediately from the rude surfeit which it had experienced. For several years, in fact, *all* large associations were stamped by the public as "bubbles and delusions."[3] Even in 1833, *The Times* was "far from agreeing that there exists now much danger of a revival of the mania of 1825; the example is too recent; and in its effects too severely felt, to render a repetition of it at all probable."[4]

Meanwhile, Parliament took one slight step intended to extend slightly the general availability of corporate privileges. The Trading Companies Bill[5] of 1834 (the title is significant)[6] recited

[1] *Annual Register* (1837), p. 172.

[2] November 16, 1832.

[3] "Law of Partnership," *Westminster Review*, XX (1834), 62.

[4] April 27, 1833. Owing to the great abundance of unemployed capital, a correspondent, in a letter "on the frauds that naturally spring out of the establishment of joint-stock companies," had apprehended "the introduction of similar schemes, with the like train of ruinous consequences" and urged the adoption of "some legislative regulation for the government of such companies, which would extend the liability of those who project them and assure to subscribers at least some account of the mode in which their funds are expended."

[5] *P. P.*, II (1834).

[6] A single voice was raised in opposition in the House. Attwood "objected altogether to joint-stock companies for purposes to which individual industry was competent." Cf. Hansard, XXV (1834), 193.

the expediency of giving companies for trading and other purposes *some* of the privileges incident to corporations created by Royal Charter, especially that of maintaining and defending actions and suits in the name of a principal officer, although, to *incorporate* by Royal Charter granted either according to the rules of common law or in pursuance of the Act of 1825, would be "inexpedient." Accordingly, the Crown was empowered[7] to confer by Letters Patent such corporate privileges as could be extended by charter at common law and under the Act of 1825. In other words, the Crown might at discretion create a *tertium quid* which was neither corporation nor partnership.

At once there was a petition seeking privileges, in response to which the Board of Trade drew up minutes which formulated its policy in the matter. The general tenor of the position taken, especially the insistence on the superiority of "individual" enterprise, suggests that Adam Smith's ghost still stalked in Whitehall among the King's advisers:

> Although the Act undoubtedly confers upon the Crown the power of granting limited privileges to Public Associations . . . and specifically points to that of sueing and being sued by their Secretary as one desirable not only for the benefit of such associations, but of the Public with whom they deal, it is necessary to take care that such powers are not conferred indiscriminately, and that so long as the present Laws of Partnership remain unchanged, . . . facilities should not be afforded to Joint Stock Partnerships which may interfere with private enterprize carried on under those laws unless the objects of such companies are of a nature fully to justify such interference upon the ground of general public advantage.

The principal circumstances which would constitute such justification were set forth as follows:

> (1) Where the object for which the association is formed is one of hazardous character, in which many individuals may be disposed to risk moderate sums, the aggregate of which may constitute a large sum sufficient for the undertaking, but in which a single capitalist, or two or three, under an ordinary partnership would be unable or unwilling to engage. The working of mines is an example of this species of adventure.

[7] By 4/5 Wm. IV, c. 94. Lists of members and their addresses were to be filed and open for inspection. Liability of shareholders was not to cease upon a transfer of their shares but to continue in force for three years thereafter.

(2) Where the capital required is of so large an amount that no single partnership could be expected to support the expense, as in the case of Railways, Canals, Docks and works of that description.

(3) Where no great advance of capital, but extended responsibility, is desirable, as in the case of Assurance Companies, etc.

(4) Where the object sought can be effected by a numerous association of individuals, such as the formation of Literary Societies, Charitable Institutions and similar bodies.[8]

Perhaps unaware of the Board of Trade's ruling, a reviewer in the *Westminster* took sharp issue with the policy expressed in the statute. "The vesting in Government of the right of granting a charter to this company or that," he maintained, "can only be a source of patronage, sought for and obtained by endless begging and intrigue." And, furthermore, in terms upon which the final struggle for limited liability was to be fought out twenty years later, he urged that "whatever facilities are now granted by charter or by Act of Parliament ought to be a matter of common right, upon the principle of *Laissez-nous faire*. Whether a person should embark all his capital in one enterprise or more, as an individual, or in one of these companies, should be a matter left to his own discretion." [9]

The rules as set forth in 1834 seem in fact but to crystallize formally the general practice which the Board had followed under the Act of 1825. Corporate privileges had been kept under lock and key and doled out sparingly, if at all. Thirteen applications were refused in 1826, among them projects for a plate-glass manufacturing enterprise, and for salt manufacturing, coal, insurance, loan and various mining companies. Actually, between 1825 and 1834, out of a total of some thirty applications, partial privileges appear to have been granted in only half a dozen cases and approval of full limited liability was extended to only one, the Nova Scotia Mining Company (1831). One other, the Haytor Granite Company (1829), was chartered with "single responsi-

[8] Cf. *Board of Trade Papers*, 5/42, fols. 259–62 (November 4, 1834). In the view of the Board of Trade, the business of the applicant in immediate question—the Scottish Brewing Co.—did not afford any one of these grounds, or any other of importance, as a justification; and to grant such power would be unnecessarily to interfere with "the course of private speculation and individual enterprise carried on under ordinary partnership laws" (*ibid.*).

[9] *Op. cit.*, p. 71.

bility" but against the recommendation of the Board.[10] Three charters carrying double liability were sanctioned, the London Portable Gas and the New Zealand Company (1826), and the London Gas Light (1831). Shareholders in the last-named could not escape liability by a transfer of their shares until six years after date thereof.[11] In fact, responding to a current inquiry as to their policy regarding "trading companies," the Board declared that it was their "usual practice" to require a double liability of shareholders.[12] The grounds for refusal strike a familiar note. In several cases, the fact that the business was already being carried on successfully by partnerships "having no Privilege of Incorporation" was a factor sufficiently adverse in the eyes of the Board.[13]

Nor do the minutes of the Board reveal any greater liberality subsequent to the passage of the Act of 1834. In that year, in addition to the application of the brewing concern already mentioned, that of a fishing company was refused and even the right of suit was denied to the Birmingham Fire Company. Its capital of £8,000 was considered to be too small.[14] The Shrewsbury Coal Company was refused for the same reason in 1835, as was also a

[10] *B. T.*, 5/39, fols. 534–35.

[11] *Ibid.*, fols. 373–74.

[12] *Ibid.*, fols. 534–35. Double liability became also a primary condition of the grant of a charter to banks overseas which the Board found it expedient to sanction, although hostile to banking enterprise at home. The conditions first laid down in a memorandum *re* the Bank of Mauritius [1830] (*B. T.*, 5/39, fols. 315–16) were subsequently followed in this important particular. (Cf. also, Baster, *The Imperial Banks* [1929], *passim.*) When, in the early thirties, imperial bank charters had become "a subject of daily recurrence," the intolerable red tape involved brought the following blast from the redoubtable Sir James Stephen of the Colonial Office: ". . . as I conceive it to be a mere matter of form and etiquette to attribute to the Attorney and Solicitor General for the time being any better notions on Topics of this kind, or any more general knowledge than belongs to their Neighbors, I should dispense with the Ceremonial, if the decision rested with myself. The fact is that a man may pass a long life in Westminster Hall, without having half a dozen times to turn his mind to the Question of the proper Constitution of Corporate Charters or commercial Partnerships. The Merchants on the Royal Exchange would be tenfold better Authorities than all the four Courts united." (Letter to the Attorney-General, May 22, 1834. Cf. *B. T.*, 1/304, Series II, fol. 12, No. 4.)

[13] *Ibid.*, 5/35, fols. 71–72.

[14] *Ibid.*, 5/42, fol. 357.

flax manufacturing company. Applications from the Edinburgh Gas and the Glasgow Union Banking Companies met a like fate in 1836, as did the Union Plate Glass Company of Manchester. A concern capable of being carried on with such a moderate capital as this last had (£125,000) "ought to be left to individual industry."[15] In 1837, the Board declined to approve the grant of charters to the Norwich Yarn and to the Insurance Company of Scotland. Indeed, over this period, 1834–37, the Minutes show approval of only three or four out of some twenty-five applications (exclusive of colonial banking projects).

In fact, the figures for private acts[16] (in Table VI) suggest that the quest of applicants for corporate privileges met with greater success at the hands of Parliament.

TABLE VI

Companies	1835		1836	
	Passed	Not Passed	Passed	Not Passed
Improvement of Towns (water works, gas, etc.)	40	29	48	37
Internal Communication (roads, canals, railways)	53	20	66	40
Navigation (harbors, piers, docks, etc.)	12	7	17	18
Companies for other purposes	4*	2	11†	2

* Including 2 insurance and 2 land companies.
† Including 1 coal, 2 manufacturing, 1 banking, 2 navigation, 3 insurance, 1 law, and 1 fishing company.

The confidence expressed by *The Times* in the events of 1825 as a cure for speculative fever was not based apparently upon a careful survey of the signs of the day; at least it gave no evidence of any penetrating knowledge of the forces making for the expansion of English economic activity. For in the spring of 1834,

[15] *Ibid.*, 5/44, fol. 295.
[16] Cf. Knight's *Companion to the Newspaper* (1835), p. 517; (1836), pp. 269 f.

"the mania broke out again."[17] By 1836, ministers of the Crown,[18] "struck with astonishment," were once again seriously warning the country against "the rage for the formation of joint-stock companies, having for their professed objects matters exceeding in absurdity those of companies of the year 1825," and from "prudential considerations," they took it upon themselves to warn the House that the current prosperity might not be permanent. It was a period of intense enthusiasm for new projects—"every newspaper teemed with schemes of the wildest kind"[19]—the joint-stock bank became the darling of the company promoter; transportation by rail gripped popular imagination and the first great railway boom took place; life assurance companies were launched by "almost every distinct religious sect, by every interest where the members of it congregate in particular haunts, every class of professional and commercial life;"[20] dozens of mining ventures were floated, steam navigation attracted enthusiasts and capital;[21] and, as usual, a host of miscellaneous projects enjoyed their brief day of speculative favor. In contrast with the twenties, when "the spirit of speculation was turned to foreign adventure," especially mining, it was "now directed to home objects."[22]

In 1826, as we have seen, Parliament had repealed some of the

[17] *Report of 1844*, Evidence, Q. 2341 ff.

[18] Spring-Rice, Sir R. Peel, P. Thomson; Hansard, XXXIII (May, 1836), 644 ff.

[19] *Annual Register* (1837), p. 174.

[20] *Circular to Bankers* (Sept. 28, 1838). By 1844, 172 English companies were doing business. Cf. *infra*, p. 88.

[21] The prospectus of the British American Steam Navigation Co. (1835), having a capital of £500,000, may be quoted: "No part of the world presents so great an opening for the successful employment of steamships as the line between London and New York. The passengers between Europe and the United States make this route their common road. The single fact that 50,000 individuals landed in New York in 1834 from this country only, affords undeniable evidence that the scope for such an undertaking is ample." Cf. also that of the British Foreign. The crisis of 1836 was only an interlude in this field. The *Morning Chronicle* stated in 1838 (City Article, July 21) that a great deal of capital was going into "sound and useful employment in several companies for the building of steam shipping for various parts of the world"; 5,000 tons were to be laid down for companies from England to New York. A company even for iron steamers on the Ganges was in formation.

[22] Hansard, *loc. cit.* Cf. Tooke, *History of Prices*, II, 278.

exclusive privileges of the Bank of England and authorized joint-stock banks *of issue* outside of London with a view to the introduction of a greater degree of stability in the credit structure of the country. Responding to the opportunity thus afforded, joint-stock banks, though organized slowly at first, had grown steadily in numbers as the following figures[23] indicate:

	Number Formed		Number Formed
1826	3	1831	8
1827	4	1832	7
1828	0	1833	10
1829	7		—
1830	1	Total	40

There were, of course, doubters and objectors. An interesting course of opinion is found in the *Circular to Bankers*. In 1828, with reference to the Bank of Manchester, that journal declared:

> It is, looking at all the circumstances, one of the most successful instances of charlatanerie, yet exhibited to the public. It is created by no want experienced by the community; it is produced by no inconvenience sustained; no doubt of the stability of existing banks; and it cannot be attended with any reasonable hope of profit to the proprietors. [Further, joint-stock banks were] very inferior to private banks. . . Joint Stock Banking Companies aim at making all cases conform to their established rules; while the very essence of the principle of a private banker is that he makes a rule for every case: hence the necessity for private consultation and unreserved confidence which never can obtain from public companies. [24]

Three years later the *Circular* spoke of the same bank as "by far the most important joint-stock banking company formed in England since establishment of the Bank of England." It was well managed and successful.[25] And finally, in 1834, "the sequel [had] confirmed the most sanguine expectations" of directors.[26]

[23] *Report of Select Committee of 1836, loc. cit.*

[24] November 21, 1828. Later (January 20, 1829), the failure of the St. Patrick's Marine Insurance Co., of Dublin was held up as a warning. Some of the shareholders became so alarmed at "the havoc made amongst the rich proprietors" that they "paid their private debts, sold their effects and expatriated themselves for life" rather than continue subject to liability. Investors in joint-stock banks could likewise "in the end reap nothing but trouble, anxiety and loss."

[25] September 9, 1831.

[26] December 5, 1834.

Table VII[27] suggests the position of a number of the new institutions in 1833.

They were launched with fanfares of glowing optimism of which the prospectus of the Cheshire and North Wales District Bank (1834) is typical. In consequence of the long standing prohibition against banks having more than six partners, it urged, England had repeatedly been reduced through the failure of private banks in periods of financial strain to, as Huskisson described the situation in 1826, "within twenty-four hours of a state

TABLE VII

Company	Established	Amount Paid-Up Per Share		Latest Dividend (Per Cent)	Market Price of Shares	
		£	*s*		£	*s*
Lancaster Banking Co.....	1826	20	0	7½	40	0
Huddersfield Banking Co.....	1827	17	0	7½	31	10
Bank of Manchester.....	1829	25	0	7	35	0
Gloucestershire Banking Co.....	1829	5	10	10	16	0
Birmingham Banking Co.....	1829	10	0	12	14	0
Halifax Joint Stock Bank.....	1830	10	0	12½	21	0
York City and County Banking Co.....	1830	10	0	12	22	0
Sheffield Banking Co.....	1830	55	0	10	94	0
Leeds Banking Co.....	1832	10	0	7½	16	0
Darlington District Bank.....	1832	15	0	8	21	0
York Union Banking Co.....	1833	10	0	7	16	0

of barter." "The happy exemption of Scotland" from parallel difficulties proved the soundness of joint-stock banks. "Their solidity was such, their ramifications so extensive, the great sources of credit so concentrated, as to fix public confidence with unswerving firmness." The passing of 7 Geo. IV, c. 46 would mark "an epoch in our commercial history." "Incalculable benefits" would follow in England upon the development of the joint-stock system. "An unlimited proprietary" would insure

[27] From the *Prospectus of a Joint Stock Banking Company to be called the Cheshire and North Wales District Bank* (1834).

paid-up capital adequate to meet the banking wants of the most populous district. Furthermore, a new principle had of late been embodied in practice which would enable "the diffusion of advantages" over the country—"the formation of District Branches which combine the unity and efficiency of an independent Bank, with a security to shareholders as depositors as ample as that afforded by the Head Bank."

Surprise was occasioned in 1833 when the law officers of the Crown declared the legality of joint-stock banks of *deposit* in and near London, "notwithstanding the old and general impression that by the Bank Charter just expiring they had been wholly prohibited."[28] The Attorney-General in an opinion rendered to the Chancellor of the Exchequer had stated that "we must premise that the common law knows no distinction between joint-stock companies and other partnerships." Furthermore, in the Act to renew the Bank's Charter,[29] there was inserted a clause

[28] *The Times* (August 31, 1833).

[29] 3/4 Wm. IV, c. 98. The Earl of Ripon stated to the House (Hansard, XX [1833], 842) that "great doubt had prevailed during the existence of the last charter" as to the precise extent of the Bank's monopoly. In fact, it had been questioned before the Act of 1826 which definitely authorized joint-stock banks without limitation on the number of partners beyond the London area. In that year, the Government prevailed over the Bank's opposition to any breach in its "rights" (cf. "Communications Relating to Alteration in Exclusive Privileges," Hansard, XIV [1826], 103 ff.). In 1822, there had been similar negotiations but no measure was brought forward (cf. Hansard, VII [1822], 760; and *The Times* [May 4, 1822], which spoke of a bargain about to be concluded "whereby the Bank [was] to surrender [this] portion of its chartered privileges" in exchange for a renewal to 1843). Joplin, who was interested in the establishment of joint-stock banks in the provinces, pointed out in 1822 that the Bank Acts contained no specific reservation of *deposit* banking to the Bank of England and argued that companies for that purpose would not therefore trench upon the Bank's historic privileges. Speaking of its "right to prevent more than six partners from entering into a banking concern" (*Essay on Banking*, 3d ed., Newcastle [1822], p. 42), he declared that if in lieu of this clause "it be enacted that no banks shall issue notes within the boundaries of the present monopoly . . . there [would be] no infringement on the rights of the Bank." If Ministers would "put their shoulders to the work, and procure an alteration of the charter, Public Banks would actually be set up in consequence" (*ibid.*, pp. v–vi). On further reflection, he seems to have felt that *no* alteration of the charter was necessary, for he asserted that there existed "no legal impediment to the establishment of joint-stock companies for trading in real capital. Both the letter and the spirit of the charter [had] reference to the circulation of bills and notes alone" (cf. "Supplementary Observations to the Fourth Edition," *Essay*, p. 90). Joplin's point, technically, would seem to hinge on the nature of a bank at the

which permitted any company or partnership to carry on banking in the London area, provided it did not borrow in England either on bills payable on demand, or within six months. The governors of the Bank were confident that this would prevent the establishment of any bank in the city. However, on the very strength of the Act, the London and Westminster was formed in 1834, and, though fought tooth and nail by the Old Lady,[30] it became one of the most powerful institutions in the country. According to MacLeod, it was the largest common-law partnership ever to exist in England.[31] A few others soon followed in London; outside, the numbers grew apace. All told, eleven were established in 1834 and nine in 1835,[32] making an average of six a year during

passage of the original acts. The Act of 1697 (8/9 Wm. III, c. 20, s. 28) read: "No other bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank shall be . . . allowed by Act of Parliament within this Kingdom." In 1707, interlopers who "by colour of the charters to them granted [for other purposes] had presumed . . . and do deal as a bank," *viz.*, had issued notes, were proscribed by an enactment (6 Anne, c. 22, s. 9) which declared that no body politic or corporate was "to take up any sum of money" on notes payable on demand or within six months. The Bank's charter was reconfirmed in these terms the following year (7 Anne, c. 7, s. 61) and subsequently. Perhaps, as in America during the colonial period, "bank" was synonymous with "a batch of paper money" (cf. Bullock, *Essays on the Monetary History of the United States*, p. 29); note issue, possibly the all-important characteristic of banking and so the chief perquisite of the Bank's monopoly *qua* corporation. The generally accepted interpretation of the law, at least that upon which men acted, was, however, that the Bank's monopoly excluded companies, corporate or unincorporate, from banking business of any kind. The Prime Minister (Liverpool) voiced such an opinion in 1826 (*supra*, p. 50). McCulloch, it would seem, must have been cognizant of Joplin's point, but he never, so far as I know, dealt with it in print. He wrote, in 1826, that the directors of the Bank had "the right to prevent the establishment of any banking company with more than six partners" (*On the Fluctuations in . . . the Value of Money and the Banking System of England*, p. 22); and a few years later he declared: "from 1708 to 1826 [no such association] could be established in England for the prosecution of the business of banking" (*Edinburgh Review*, LXIII [1836], 424; cf. also his *Historical Sketch of The Bank of England*, pp. 15–16, London (1831). In any event, no joint-stock concern, so far as I am aware, got on its feet outside of London before the Act of 1826, or in London until after the Act of 1834.

[30] Cf. Levi, *History of British Commerce*, p. 209. Opposition from the Bank succeeded in defeating the Westminster's bill which sought power to sue, etc. Cf. *infra*, p. 98. As the *Banker's Magazine* said in 1844 (I, 69): ". . . while Lord Althorp held the door gently with one hand, the Bank directors who stood behind succeeded in slamming it back, before the Joint Stock System was fairly admitted."

[31] *Dictionary of Political Economy* (1863), p. 121.

[32] *Report of Select Committee of 1836, loc. cit.*

the first ten years following the Act. In another decade, it was to be said:

> The introduction of the manufacturing system, combining the discoveries of Watt, Arkwright, and Hargreaves, formed an epoch from which proceeded the greatest and most rapid accumulation of wealth which the history of the world records. These were at an early period, and even more so latterly, aided by what fairly may be termed an invention; which though more palpable, has not been less efficient in promoting the progress of industry and improvements: . . . a new and more perfect banking system, which has only of comparatively late years been so understood and organized as to bring all the unemployed capital of the country to the aid of enterprise.[33]

A contemporary pamphleteer was concerned with "the imminent risks of destruction incurred by all those who lend their names to such companies, and who subscribe moderately, under a persuasion of their responsibility being limited to the nominal sums which they contribute."[34] *The Times* felt "bound to express wonderment that such a warning" was thought to be necessary, and "that persons about to engage in joint-stock banking companies should be supposed to be so ignorant of the extent of their liabilities as to require it. If any person imagined that he could have all the gains of a trade (for banking is a trade) without incurring any chance of its losses, he ought to write 'fool' after his name in the list of subscribers." And further, "every proprietor engaged in a company knows that he risks the whole of his fortune when he enters such an undertaking. He protects himself against malversation by his caution as the public are protected against loss by his wealth."[35]

Lord Althorp, in his opening speech on the renewal of the Bank's Charter,[36] had suggested the grant to joint-stock banks

[33] *Morning Chronicle* (October 9, 1845).

[34] *The Times* (August 31, 1833), referring to Farren's recently published pamphlet, *Hints, by Way of Warning, on the Legal, Practical, and Mercantile Difficulties attending the Foundation and Management of Joint-Stock Banks*. The demand for a third edition by December led the author fondly to believe that "the London Public purchase *Hints by Way of Warning* rather than shares in Joint Stock Banks." For replies, see *Dialogue between Mr. John Bull, Merchant of London, and Mr. Geo. Farren* (1833) and *Facts and Reasons Pro Joint Stock Banks*, by Civis (1833).

[35] September 27, 1833.

[36] Hansard, XVIII (1833), 183–84.

of *deposit*[37] of permission to trade on a "limited responsibility." *The Times* was persuaded that no such bill ever would be introduced: "Every man in this country who chooses to take the advantages of a joint-stock company should be liable for its losses. If his name on the list of subscribers invites the public to confidence, his fortune thrown into the common stock ought to give the public security against mis-management, and if, as a *sleeping partner*, he chooses to be robbed, the public ought not to be robbed because he chooses to *sleep*." At any rate, Althorp's proposal aroused so much opposition from the country bankers that it could not be carried.[38]

By March, 1836, when William Clay moved for a select committee to inquire into the joint-stock banking system, there had been established 61 joint-stock banks with branches at 472 places; 46 of them had a paid-up capital of almost £6 million. Four had been organized since January.[39] The year was to witness, moreover, the foundation of some 38 more.[40] In the spring they became "the occasion of the display of a spirit of speculation

[37] Baring, a supporter of limited liability, could see "no grounds for the distinction" between banks of issue and banks of deposit. *Ibid.*, p. 191. Vincent Stuckey had argued for limitation in his evidence before the Committee on the Bank of England's Charter (see *P. P.*, VII [1831–32], QQ. 1203 ff.); also, before the Secret Committee of Joint Stock Banks (*P. P.*, IX (1836), ix). Cf. D. Gavin-Scott, *History of the Rise and Progress of Joint Stock Banks in England*, London (1837).

[38] Cf. *Morning Chronicle* (July 3, 1833). "Public joint-stock banks are, in our judgment," declared the *Circular to Bankers* (April 18, 1834), "much inferior to private banks under the old system, but they are infinitely better than chartered banks, because the individuals engaged in them have a remote responsibility for their prudent conduct and good management."

[39] Hansard, XXXIII, 843 ff.

[40] From returns of the Stamp Office to November 26, 1836 (cf. *Annual Register, loc. cit.*), "New joint-stock banks, at once the favorite offspring of the prevailing spirit, and the most effective instruments for propagating its contagion, were opening in all parts of the country, which they threatened to deluge with their rival floods of issue." (*Ibid.*) Pertinent also are the data for the aggregate amount of notes circulated in England and Wales (cf. *Report of Secret Committee, loc. cit.*):

Quarter Ending	Private Banks	Joint Stock Banks	Total
December 28, 1833.....	£8,834,803	£1,315,301	£10,152,104
June 25, 1836.....	8,614,132	3,588,064	12,202,196

strongly directed to that mode of investment. The premium to which all, or nearly all, the banks formed or projected up to that time had attained, while by the sale of reserved shares they extended the capital, and credit, and connections of the existing establishments, contributed powerfully to the formation and projection of new ones. And so strong was the spirit of enterprise directed to this mode of adventure, that, notwithstanding the alarm sounded in the House of Commons by Clay's motion of inquiry, the formation and projection of new banks proceeded for some time after, not only with unabated but with increased activity."[41]

William Clay argued for the limitation of liability and traced the unwonted expansion of credit to its absence:

> By rendering all the shareholders individually responsible, you afford the most dangerous facility for obtaining credit . . . the banks feeling no necessity to limit the accommodation they afford from want of funds. . . . [The credit which they obtained was] not in proportion to paid-up capital, but to the presumed extent of their ultimate solvency. [And] to encourage the intervention in the monetary system of the country of a circulating credit founded upon the supposed aggregate fortunes of the shareholder is to attempt to coin into money the lands, the houses, the factories, the fixed capital of the country. It is to fall again into the famous error of Law's Mississippi scheme.[42]

He went on to urge that with the establishment of banks of limited liability they would acquire: "the most important of all securities for good conduct . . . a certainty that the most respectable persons in the community would become partners in them. Once remove the well founded alarm which being engaged in indefinite responsibility inspires . . . and banking companies would comprehend all the wealth and intelligence in their district . . . and be conducted on sound principles, because shareholders would be content with moderate profits."[43]

However, the privilege was to be available only on condition that capital be fully paid up and "entire publicity" be given to the affairs of the banks by obliging them periodically to publish

[41] Tooke, *History of Prices*, II, 274–75.
[42] Hansard, XXXIII, 843–46.
[43] *Ibid.*

their accounts.[44] Clay summed up his proposals in a concise formula: "limited liability; paid-up capital; perfect publicity."[45]

The Times was ready with an answer:[46]

> Once let shareholders be pronounced only partially liable, and they will scarcely remember the existence of the bank, except when they occasionally receive some interest for their investment; and being engaged in enterprises of far greater importance, would suffer an establishment which affects their prospects but in a trivial degree to fall into decay or ruin with as much indifference as they hear of a breakdown of an old carriage or an old cowhouse. No, it is to the wealthy shareholder that the public looks for security; destroy, or which is the same thing, limit his liability, and the bank becomes a delusion. This is the sound law of the question, as expounded by the first lawyer of the day [Eldon, presumably]; and it is sound law because it is the only law on such a matter which is at once intelligible, just and safe.

In a review of the issues in 1836,[47] McCulloch excoriated Clay's proposal. "The adoption of limited responsibility would," he maintained, "be productive of the most injurious results, and would go far to annihilate whatever there is of solidity in the present system." It would involve "the abolition of a law under which the manufactures and commerce of the country have grown up to their present unexampled state of prosperity; and the introduction of a new and untried system, alien to our habits, and all but unanimously objected to by all the best informed practical men. . . . The inconveniences that would result from the formation of partnerships with limited responsibility would be a thousand times greater" than any attached to the ordinary

[44] Althorp had advanced this latter suggestion in 1833. Cf. Hansard, XVIII, 176–77.

[45] *Ibid.*, XXXIII, 857. Some suggestions similar to Clay's may be found in the *Quarterly Review*, XLII (1830), 485: English joint-stock banks were in no case founded upon paid-up capital, so it was argued. Their affairs were kept "an impenetrable secret—all is darkness, hesitation and distrust . . . no establishment having anything to support it except the personal credit of the partners." Joplin, likewise, urged the limitation of liability and for similar reasons. Cf. his *The Principle of Personal Liability of Shareholders in Public Banks Examined* (1830). Cf. also *Edinburgh Review*, LVIII (1833), pp. 62–63, and *Remarks on Objections to Joint Stock Banks* (1833).

[46] May 14, 1836.

[47] "On Joint Stock Banks and Companies," *Edinburgh Review*, LXIII (1836), pp. 419–41. Clay replied in a pamphlet, *On Joint Stock Banks*, etc. (1836), which contained his speeches and a refutation of McCulloch's review. The *Circular to Bankers* (Aug. 5, 1836) expressed agreement with McCulloch.

partnership. "Indeed, we have no idea, supposing that these were introduced, that they would be allowed to continue for any length of time." They would "substitute carelessness for attention [and] open a wide door for the commission of fraud."

McCulloch stamped as fallacious Clay's idea that a bank's credit would be proportional to its paid-up capital. For the check of "perfect publicity" he had nothing but contempt:

> It astonishes us that anyone living in London and having intercourse with practical men, should have been found to lay the least stress on the publication of balance sheets, or accounts of assets and obligations. They are worse than worthless, being eminently calculated to deceive and mislead. [To effect the plan] by leaving it to the *honour* of the parties; that is by allowing each bank to report as to its own credit and solvency! It is difficult to suppose that Mr. Clay can be serious. . . . [And] even though the parties were perfectly honest, the publication of a balance sheet would be good for nothing.

However, he did advocate the registration of partners: "the knowledge of who the parties are in a bank, and their unlimited responsibility are the only securities that are worth a pinch of snuff."[48] Nor could he find any disinclination on the part of individuals to engage in companies with unlimited liability.

Most of the joint-stock banks established during the period maintained their footing through the crisis and violent liquidation of 1836–37. The death knell of the individual private bank (which relatively had lost ground since the "ordeal" of 1825)[49]

[48] McCulloch remained to the end of his life a staunch opponent of limited liability. Cf. the articles on "Companies" and "Partnership" in the successive editions of his *Commercial Dictionary* beginning with 1850–1854, 1855, 1862, 1867. Cf. also, the *Encyclopædia Britannica* (8th ed., 1859).

[49] The figures for number of banks registered tell the story:

	Private	Joint Stock
1820–21	521	.....
1825–26	554	.....
1830–31	436	19
1835–36	407	100
1840–41	321	115

(Cf. *An Account of the number of Private and Joint Stock Banks, P. P.*, LII [1843].) By 1832, the country banks were loudly complaining that their interests had been greatly injured by the Act of 1826 (cf. Hansard, XIII, 380–81). The next year the

was now rung once and for all. The joint-stock bank had struck firm roots; it was definitely on its way to a position of dominance in English banking, before many years practically to supersede the private bank. As the Secret Committee on Joint Stock Banks (1836) reported, "these banks are rapidly extending in all directions . . . a principle of competition exists, which leads to the extinction of all private banks, and to their conversion into banking companies."[50] The extension of branches, already begun, was to spread their influence into every nook and corner of the country.

"The comparative exemption from failure," wrote Tooke,[51] "must in fairness be admitted to form no slight ground for inference in favor of the system . . . the joint-stock banks appear on the whole to have justified the policy" which led to their establishment. McCulloch wrote: "How far the principle of unlimited responsibility . . . may have contributed to the solidity which it has been proved . . . to possess, I will not stop to discuss, . . . but the system . . . stands out in pre-eminently advantageous contrast to the discreditable exhibition of American banks, with their state charters and limited responsibility."[52]

In point of fact, the liability of bank shareholders was not limited until 1858.[53] McCulloch was then to be of the opinion

following protest was registered in the House of Lords: "By giving a right to open banks of deposit to companies with an unlimited number of partners, a spirit of speculation will be encouraged. Their great capital will enable them to embarrass the Bank of England in the discharge of its most important duties" (*ibid.*, XX, 842).

[50] *P. P.*, IX (1836), 591, p. v, and Evidence, *passim*. The outcome had been accurately prophesied in 1830 in the *Quarterly Review* (cf. Vol. XLIII, p. 345). According to the prospectus of the Royal Bank of Westminster (1837), 100 private banks in England and Wales were merged into joint-stock banks, 1826–36. By 1854 they had "wholly disappeared in some portions of the country," *e.g.*, in Sheffield (cf. *First Report, Royal Mercantile Law Commission, P. P.*, XXVII [1854], Appendix, p. 213).

[51] *Op. cit.*, Vol. II, pp. 316–17.

[52] *Op. cit.*, pp. 435–36. He continued: "The United States would profit materially by the abolition of the limited responsibility plan. Its introduction into banking concerns . . . . had led to the adoption of an infinity of regulations for the prevention of fraud; but as might have been anticipated, these have proved quite ineffectual for their object." As an example, he mentioned "the Sutton joint-stock bank incorporated in the moral and religious city of Boston in 1828." He did not suppose "the swindlers of Boston more dexterous than those of London."

[53] *Infra*, p. 136.

that its extension would not have much influence one way or the other. He could not believe it possible, if an ordinary bank limited its liability, that half a dozen individuals would be found "foolhardy enough to entrust their money to its keeping". If they did they would deserve the fate which might be expected to await them—loss of their deposits.[54]

Coincident with joint-stock bank promotion, there was an important development in the technique of company finance: the introduction of shares of small denomination. In banking companies, some were as low as £10; few were above £50, and with not more than 5 or 10 per cent callable, according to the prospectuses, any individual who had "ten or twenty shillings to spare" might become a shareholder.[55] Thomson thought that in any instance they presented a "great danger of evil."[56]

"The great question of limited responsibility,"[57] further to quote the President of the Board of Trade, was again discussed in Parliament in this decade and with wider reference in the course of debate in the session of 1836 upon a bill to incorporate the Dublin Steam Packet Company.[58] The Attorney-General stood in favor of a general law which would place all companies on the same footing, as did also Dr. Bowring, who opposed the particular bill in question because it made a special exception for the benefit of an individual concern. He felt, nevertheless, "that the time would soon arrive when the principle of limited responsi-

[54] *Commercial Dictionary* (ed., 1867), p. 406.

[55] McCulloch, *Edinburgh Review, op. cit.*, p. 428.

[56] Hansard, XXXIII, 690.

[57] Hansard, XXXII (1836), 1192. In prospectuses of new companies, promoters continued to guarantee limited liability, *e.g.*, Essex Marine Salt Co. (1834): "Proprietors are not to be liable beyond the amount of their respective shares; all contracts on behalf of the company to contain that stipulation"; the West Treveseau Mining Co. (1835): "No liability can possibly arise to shareholders beyond the amount subscribed as all concerns of the company will be carried on for ready money"; the Minerva Life Assurance Co. (1836): "It is a fundamental principle of this company that the responsibility of shareholders shall not exceed the amount of their respective shares"; the Rhymney Iron Co. (1836): "The properties are to be held by trustees, and management to be regulated by deed, in which it will be provided that the liability of the shareholders shall not exceed £50 for each share."

[58] Hansard, XXXII, 205 ff.; 1187 ff.

bility would be recognized as the most judicious one. Nothing could be more discreditable to the mercantile community than the law which made the private property of individual shareholders responsible."[59] Sir Henry Parnell, on the other hand, maintained that the endowment of companies with such a "privilege" actually prevented the employment of capital. "Private adventures could not go into competition with a company managed on the principle of non-liability."[60] The principle was a "bad one, opposed to the great principle under which the wealth of the country had grown up." The business of such a concern was "never conducted upon the true principles of trade and commerce." With justice, it would seem, could the *Circular to Bankers*[61] term the speech "singularly obscure and unsatisfactory.... If companies with limited liability never conduct their affairs upon such 'true principles,' one would think that private adventures would have the better chance in competition.... Great public interests were involved in the question of limited liability" —in the many undertakings "too great and too full of risk for individual adventure," every possible facility and encouragement should be given for the free application of capital in such small proportions as would not be ruinous to any of the contributors.

Although the history of transportation has been repeatedly chronicled, no account of the growth of corporate organization in this period would be satisfactory without at least brief reference to the railway. Here we meet in the germinal stage a phenomenon of fundamental importance in modern economic life: an industry sufficiently large in scale to have recourse to the general market for its capital, and in coalescence, the further growth of the share market, with progressively increasing liquidity of investment.[62]

[59] *Ibid.*, p. 1194.

[60] *Ibid.*, pp. 1189–90.

[61] April 22, 1836.

[62] From January 1, 1826 to January 1, 1839, railway capital, "monies to be raised" under Acts of Parliament, was as follows (*First Report, Select Committee on Railway Communication, P. P.*, X [1839], App., p. 75):

Capital in joint stock.....	£41,610,814
Power to raise by loan.....	16,117,630
	£57,788,444

It is a remarkable fact, however, as the *Circular to Bankers* observed in 1836:

> that the Rail-way system advanced and became established in the public confidence almost wholly without the assistance of the Stock Exchange. The support afforded to it was derived almost exclusively from the capitalists and men of thrift and opulence in the mining and manufacturing districts of the north of England. . . Taking into account all the railways now in operation—we mean all such as are formed, or are in the course of being formed—in the counties of Northumberland, Cumberland, Durham, Yorkshire, and Lancashire, not one-twentieth part of the capital expended upon them was furnished by members of the Stock Exchange or Stock-brokers. When the Birmingham & London was brought out, they participated very largely, as they did in a less degree in the Grand Junction which unites that with the Liverpool and Manchester. The commencement of these two great lines may be stated as the first occasion when the Stock Exchange people began to take any great interest in this description of property. In the Southampton they again participated pretty deeply: though we believe nearly one-fourth of the Rail-way is owned by the people living north of the Trent who were mainly instrumental in making the shares current in the market; yet here there is no doubt that a greater proportion of it is the property of Londoners, connected directly or indirectly with the Stock Exchange than any preceding railway enterprise of magnitude.
>
> It is useful to mark the progress of the connection of the Stock Exchange with this new system. Now, if any Rail-way be advertised in London, we would venture to assert that applications would flow in from the Stock Exchange for at least one-quarter part of the whole number of shares.[63]

The immediate impetus to the astonishing railway boom of 1835–37, which in its later stages paralleled in intensity the eruption of activity in banks, seems to have been the success of the Liverpool and Manchester. Shares in the company advanced to a high premium, and "the profits thus derived" or anticipated acted as a stimulus to other ventures.[64] In 1825–26, Parliament had authorized eighteen railways and five more in each subsequent year until 1836, when statutory powers were granted to twenty-nine, and in 1837 to fifteen others.[65] However, specula-

[63] November 6, 1835.

[64] Tooke, *op. cit.*, II, p. 276. Cf. McCulloch, *op. cit.*, pp. 420–21; and *A Letter to the Rt. Hon. W. E. Gladstone on Railway Legislation* (1844), p. 3. In the words of the author of the latter, "The capitalists of Lancashire were not men to stand still when this new world of enterprise was discovered."

[65] Cf. Clifford, *Private Bill Legislation*, I, 85. The *British Almanac* (1827, *et seq.*) contains an annual account of private bills passed. See also *Companion to the Newspaper*, Vol. I (1833), pp. 11, 60.

tion was by no means confined to companies which secured incorporation. "New lines were proposed to intersect every part of the Kingdom."[66] The shares in many "half-fledged projects" rose to extravagant prices and the good fortune of some of the earlier holders produced a "crowd of undigested conflicting projects."[67] In 1835, thirty-five companies were actually promoted, having a total nominal capitalization of over £34 million;[68] from 1834 to the end of 1836, there were eighty-eight all told, capitalized at approximately £70 million.[69] Even the recently established *Railway Magazine* wrote that "a foreigner reading our railway prospectuses would surely imagine us to be the most mad or the most patriotic people on earth."[70] Although the boom collapsed in 1837, the setback was but temporary, and the revolution in transportation stormed forward. The income derived from the duty on railway passengers rose from £6,852 in 1835 to £72,716 in 1840.[71] By 1843, £66 million of a nominal capital of £82.8 million had been actually raised.[72] Railway shares were soon to displace canal securities as standard investments. Meanwhile, as in the case of company organization in other fields, Parliament was groping toward satisfactory general legislation by way of its customary process of innumerable special acts. The grant of limited liability to railways, however, does not at any time seem to have been questioned.[73] As the *Report of 1844* observed, "the acts have always considered railway companies . . . as entitled as a matter of course to be nonliable companies . . . whether they be large or small."[74]

As suggested above, a large number of promotions in miscellaneous fields followed in the wake of the joint-stock bank and

[66] Tooke, *loc. cit.*

[67] McCulloch, *loc. cit.*

[68] *Report of 1844*, App. 4. According to *The Times* (October 31, 1835), overapplication three or four times for security issues was common.

[69] *Report of 1844*, App. 4.

[70] Quoted by *The Times* (April 1, 1836).

[71] *Fourth Report, Select Committee on Railway Communication, P. P.*, XIII (1840), pp. 3 ff.

[72] *Report of Royal Commission on Railways, P. P.*, XXXVIII (1867), p. 9 f.

[73] Cf. Shannon, *op. cit.*, p. 286.

[74] *Op. cit.*, p. 217.

the railway, once again to a considerable extent "got up by speculators for the purpose of selling their shares."[75] One observes with interest that the newer industrial towns, Manchester and Liverpool, had now become the scene of much speculative activity.[76] Poulett Thomson estimated in March, 1836, from London and provincial newspapers, that there were 300 to 400 projects under way with a nominal capital of some £200 million![77] In 1835, according to a list published in *The Times*,[78] 41 miscellaneous companies were floated, capitalized at almost £20 million. The same year saw the formation of 41 mining enterprises (nominal capital, just under £3 million).[79] The following summary of the period, 1834–36, is compiled from a subsequent estimate.[80]

TABLE VIII

Kind of Companies	Number of Companies	Nominal Capital
Railway	88	£ 69,666,000
Mining	71	7,035,200
Packet and navigation	17	3,533,000
Banking	20	23,750,000
Conveyance	9	500,000
Insurance	11	7,600,000
Investment	5	1,730,000
Newspaper	6	350,000
Canal	4	3,655,000
Gas	7	890,000
Cemetery	7	435,000
Miscellaneous	55	16,104,500
Total	300	£ 135,248,700

The mining enterprises were chiefly for the development of tin, copper, iron, or coal properties.[81] The *Quarterly Mining Review*

[75] Hansard, XXXIII, 689.
[76] Sir Robert Peel, *ibid.*, p. 686.
[77] *Ibid.*, p. 690.
[78] January 8, 1836.
[79] *Ibid.*
[80] *Report of 1844*, App. 4.
[81] *Ibid.* A list of 27 formed in 1835 appeared in the *Mining Review* (1835), III, 113–28.

for July, 1835, enumerated twenty-seven recently formed companies, the majority of which were to work mines in Cornwall; in contrast with 1825, only four were foreign ventures.[82] Henry English, the editor, was openly skeptical of joint-stock organization. "We are yet to see," he wrote, "whether mines, although worked by private individuals, can be carried on with *equal* advantages and benefit by a company. . . . It seldom requires a company composed of £5 scrip shares to work a mine which is deserving of attention, as adequate capital may be raised by other means."[83]

Two large coal companies (each with a capital of £500,000) were promoted to operate on the Durham fields but they proved to be failures and the shareholders lost heavily—in one of the two much more than their investment, owing to their unlimited liability. "Development fell back into the hands of the old type of private partnership."[84] In 1843, Spackman[85] enumerated eighty-one British mining companies having a paid-up capital of £4,500,000. "For the greater part," he remarked, "they are not only complete failures, but are memorable proofs of the folly and cupidity of British capitalists on the one hand, and the knavery of their projectors on the other." This was not, however, "to be taken as an inference unfavorable to mining interests generally, for its great importance will be fully appreciated from the amount of its annual produce" (coal, 28,498,193 tons at 10*s*. per ton, £14,249,091; iron, 1,060,875 tons at £4 per ton, £4,243,500).[86]

Several manufacturing concerns[87] are found in the miscellaneous group: five to make locomotives, one nails, one for metal

[82] *Op. cit.*, III, 118–28.
[83] *Ibid.*, pp. 1–10, *passim.*
[84] Clapham, *op. cit.*, I, 434.
[85] *Statistics of the British Empire* (1843), p. 157.
[86] *Ibid.*, p. 84.
[87] The *Circular to Bankers* (November 23, 1838) observed: "We are convinced that *the progressive extension of mining and manufacturing* [my italics] will compel the Government to pass some new law of company partnership which shall remove some of the weighty objections that at present prevent men of capital and intelligence from entering useful enterprises." The editor had in mind a suit for payment for engines and materials brought against "wealthy members" of the British Iron Co.

rolling,[88] one hat-making establishment. "Joint-stock capital had of late years [1843] been invested in the iron trade":[89] there were ten companies in the Welsh counties with actual capital of over £4 million, but the majority were "notoriously losing concerns."[90]

In contrast, one finds successful company organization in one branch of the textile industry. "Joint-stock company woolen mills prevailed throughout the clothing districts of the West Riding of Yorkshire, the rule not the exception . . . the processes of the manufacture of cloth . . . not carried on at home are executed at the company mills."[91] At the time of the passage of the Companies Act of 1844, there were twenty-four woolen manufacturing companies in existence. The mills throughout the

[88] Probably the Rhymney Iron Co., capitalized at £500,000, formed "to continue the working of the existing furnaces, extending their number, and constructing rolling mills and other requisites for the manufacture of all descriptions of bar, railway, and other iron." Cf. *Prospectus*, dated 1836. The *Circular to Bankers* (September 29, 1843) stated the amount of capital embarked by joint-stock companies in iron mining operations, chiefly in South Wales, to be almost £4,000,000, of which the British Iron Co. (promoted in 1824) accounted for £1,600,000.

[89] *Report of 1844*, Evidence, Q. 2370.

[90] *Ibid. The Times* (June 21, 1843) quoted the following from the *Monmouthshire Beacon*: "The large fortunes secured in times when the foreign markets were all our own, and the produce at home scarcely sufficient for the demand, arrested the eager eyes of small capitalists, and induced the formation of companies . . . . each member expecting to become at least . . . a Crawshay, if not eventually a Peel or an Arkwright. . . If it had been a law of nature that the whole world should, for a given number of years, be clothed in iron, be domiciled in iron, sleep upon iron, ride upon cast iron horses, and in cast iron chariots, no greater zeal to give effect to the law could have been displayed . . . [firms where] the vigilant eye of a prominent member of the firm was always upon the works were losing £1 per ton. What then must the Joint Stock Company be losing with its double establishment of clerks, its committees and town offices? . . . The question is—who will blow out and retire? Are the great and ancient houses in the iron trade to retreat before the companies or the companies before them?" Henry Scrivenor (*History of the Iron Trade*, 2d ed. [1854], pp. 280–81) asked: "Are Joint Stock Companies incompatible with success in iron making?" Thirty years' experience proved that they were not "but we will not say cannot—be profitable." He attributed failure mainly to insufficient "ready-money capital." The "Trade Directory" of the *Mining Almanack* (edited by H. English) for 1850 lists 31 "coal and iron companies" with offices in London.

[91] *Report of 1844*, App. 5, "Statements as to Joint-Stock Woollen Mills." It appears that the first company mill was erected at Stanningly about 1813 "by a few persons who ultimately got into difficulties and were dissolved. The second at Ecclesfield, the third at Paisley, and they have continued." (*Ibid.*)

West Riding were "principally owned and occupied by clothiers in shares." The companies were complaining of the inconveniences to which the laws of partnership exposed them.[92]

Actually, however, in this industry as in many other trades most representative of the industrial revolution (apart from transportation), the simple partnership, or in some instances and later, the "private company," or "close corporation" remained the dominant form of ordinary commercial organization right down into the twentieth century.[93]

One outcome of the renewed surge toward joint-stock association during the period under review was an inquiry into the law of partnership commissioned by the Board of Trade. Its president, Poulett Thomson, had long been interested in company organization.[94] He had introduced the Act of 1834. Although hostile to "companies for objects such as private individuals are perfectly able to accomplish,"[95] he had defended staunchly, during the boom of 1836, others which he conceived to be "a national good." For most of the great undertakings of late years, he declared to the House, had been achieved "by the enterprising spirit of individuals forming themselves into joint-stock companies." He was anxious lest the current "mad and foolish schemes" discourage their further development. Now, no doubt, he was instrumental in authorizing an investigation on behalf of the Board not only of the difficulties of suit, etc., encountered by

[92] *Return of . . . . Companies, 1846, P. P.*, XLIII (1846). In contrast, only one cotton manufacturing company is listed.

[93] Cf. Clapham, *Woollen and Worsted Industries* (1907), pp. 152 f.: "In the early nineties . . . companies that issued reports and balance sheets, whose shares were regularly bought and sold, were rare in all branches of the woollen and worsted and associated industries; though private companies of course existed. Even now, after the outbreak of company promotion in the late nineties the number of spinning and manufacturing companies whose shares were quoted on the West Riding Stock Exchanges is comparatively small . . . the family business, though it may have assumed the company form, is still the prevalent type."

[94] He had been a director of several of the 1825 companies. Cf. Shannon, *op. cit.*, p. 277.

[95] Hansard, XXXIII (1836), 689 f. Sir Robert Peel had expressed similar views (*ibid.*, 686 ff.). Regarding the new Liverpool Foreign Trade Co., capitalized at £250,000, Thomson remarked, "It is not an unusual thing for an individual in Liverpool to embark" as much in foreign trade "and there are many who have a great deal more engaged."

partnerships of many members, but also of the expediency of introducing in England the limited trading partnership known to French commercial law as the *société en commandite.*

The ensuing *Report on the Law of Partnership*[96] rendered in 1837 frowned upon any such "innovation." The opinion of the great majority of the witnesses questioned was decidedly unfavorable. Among them were Thomas Tooke, S. J. Loyd, Horsley Palmer, and John Gladstone. Tooke observed that "if the object in view were to limit the responsibility of joint stock companies in undertakings which admit of being conducted by individuals or by ordinary partnerships, it would be clearly objectionable . . . . public companies are rarely, if ever, so carefully, economically, and skillfully conducted as private establishments." The example of France did not apply. "No encouragement seems here wanting to bring capital into trade." According to Loyd, it involved injustice inasmuch as it would tend "to remove a portion of the loss from those who have voluntarily engaged in the concern, who have the means of watching and controlling its progress . . . for the purpose of throwing it upon those who . . . had no power of management." Palmer believed that "it would tend to give a false credit." However, there were names to conjure with among those who argued for the change: Senior, Norman, and Francis Baring, as well as Lord Ashburton. In Senior's view, the limited partnership would afford greater security to creditors than that available when partners were responsible *in solido* but perhaps trading with a borrowed capital. For, in the former case, the lender becomes a partner not only without rights against firm creditors but liable to them for his share of the capital and profits. "Under our system, the person who lends capital takes a mortgage . . . and the creditor who knew nothing of the transaction" might find the assets swept away by claims prior to his own. Senior, furthermore, at this time, seems to have had in the back of his mind the investor, long since become typical, who is a mere purchaser of income and not

[96] By H. Bellenden Ker, *P.P.*, XLIV (1837–38); reprinted in *Report of 1844*, App. 1. *The Times*, it is to be noted, published it *in extenso* in the issues of October 9 and 10, 1838.

an entrepreneur. Busy persons and "those unaccustomed to business," he suggested, did not employ any of their property in ordinary partnerships, with the result "that small sums are often spent instead of being accumulated or are employed less productively than would otherwise be the case, in chartered companies or in foreign loans. I have no doubt that *commandite* partnerships, which would allow a small capitalist to obtain commercial profit without risking more than a definite sum, would cause much fresh capital to be employed." The opinion of Norman, and also of Ashburton (on the basis of his experience abroad) was also favorable, provided proper *publicity* were required. John Coles, in an argument to be advanced vehemently two decades later, urged that the limited partnership would foster the alliance of "science and ability with capital."[97] Indeed, it would be the vehicle for putting "capital into operation," free from monopoly and uncontaminated by the spirit of share-jobbing, which chartered companies too frequently occasioned.

Nevertheless, in contrast with continental,[98] American,[99] and, as we have observed, also with Irish practice,[100] the limited partnership remained unknown to English law[101] until the twentieth

[97] An elaborate argument from this premise for the application of *commandite* to banking may be found in H. S. Chapman, *The Safety Principle of Joint-Stock Banks . . . Exhibited in a Modification of the Law of Partnership* (1837).

[98] Known on the continent for many centuries, it was regulated in France by an ordinance of Louis XIV in 1673 and recognized in Napoleon's *Code de Commerce*, 1807. Cf. Pollock, "The Law of Partnership in England," *Essays in Jurisprudence* (1882), IV, 99 and Lindley, *On Partnership* (9th ed., 1924), p. 924.

[99] Ker's Report, it may be noted, reprinted the contemporary statute of incorporation of the State of New York.

[100] *Supra*, p. 51.

[101] According to Pollock, "When the law of partnership was formed [in England] by modern judges and chancellors, the notion of a partner with limited liability never appeared." (*loc. cit.*) Or, as Lord Loughborough declared in 1788: "In many parts of Europe, limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being that if a partner shares in the advantages, he also shares in all the disadvantages" (*Coope* v. *Eyre* [1788], 1 H. Bl. 48). Holdsworth assigns the following reasons why the limited partnership did not take root in England: "Firstly, the conquest by the courts of common law and equity in the fields of commercial jurisdiction made English commercial law very insular. Secondly, in the trades controlled by the later regulated companies this form of commercial society was discouraged, because it afforded a means by

century.[102] With complete freedom of incorporation an accomplished fact, it had by then become an anachronism.

The Act of 1834 was intended to obviate some of the inconvenience and expense of applying to Parliament for corporate powers. But, as we have seen, the task of obtaining privileges from Parliament as well as from the Board of Trade had remained difficult. It was expensive[103] and uncertain of success—more often than not, impossible. Large partnerships, joint-stock and ordinary, still labored under a common law which had for long been ill adapted to their inherent necessities. In legal proceedings (as the Report of 1837 again emphasized vigorously) it was necessary to join all members as parties. Consequently, by putting in abatements, a suit could be made interminable. Relief was often unattainable and justice denied.[104] Ker's Report proposed to make illegal all partnerships of more than fifteen members unless formed by registered deed of settlement[105] and to prohibit the sale of shares in any company not so registered: "Perhaps all that the public can require is that they should know who are the partners liable and have easy means to suing them."

"An act for better enabling Her Majesty to confer certain

which persons not free of the company might succeed in trading without being free of the company. Thirdly, England's trade did not begin to develop rapidly till the latter part of the sixteenth century; and by that time the joint stock company was emerging, through which the ideas, implicit in the later form of *commenda*—the opportunity for an investment of capital and a limited liability—could be more readily carried out. Fourthly, at the beginning of the eighteenth century legislative opinion was hostile to the limitation of liability, which was the essential feature of the *commenda* (*History of English Law*, VIII, 196–97). Mill argued in his *Principles* (V, IX, QQ. 5–7 [1848]) that its prohibition in England was "without defense". In 1880, Pollock noted "a great want in English law . . . a missing chapter" which in his judgment should be supplied (*loc. cit.*). Cf. *infra*, Chap. VI, *passim*.

[102] By 7 Edw. VII, c. 24.

[103] The fees paid for a charter to the Privy Council and the Board of Trade in an ordinary case amounted to £402; in the case of a bank, £955. (Cf. Levi, *op. cit.*, p. 338.) The expenses of legislative incorporation were in some instances extraordinarily large; *e.g.*, for carrying the London & Birmingham bill through Parliament, £72,868; that of the North Midland, £40,588. (Cf. Waterston, *Encyclopaedia of Commerce* [1844], p. 198.)

[104] Cf. *Report of 1844*, App. 1, pp. 246 ff., and evidence of Horsley Palmer, *ibid.*, p. 278.

[105] "The Deed of Settlement constitutes trustees of the partnership property, directors," etc. Cf. Smith, *Mercantile Law* (2d ed., 1838), p. 58.

Powers and Immunities on Trading and other Companies" was passed in 1837.[106] An important, if slight, step was taken toward general registration. Authority was granted to the Crown to extend by Letters Patent "any privileges which according to the rules of common law it would be competent . . . to grant . . . by any charter of incorporation" provided shareholders, transfer of shares, etc., were enrolled. Liability might as hitherto be limited at the discretion of the authorities. Accordingly, the Crown still possessed a veto. But, it is important to note one considerable advance upon the Act of 1834:[107] the liability of a member ceased upon a transfer of his shares. Over the years following (1837–54), more than fifty commercial companies, "quasi-corporations" as Lord Halsbury has called them,[108] did, in fact, receive privileges under the Act.[109]

The year following (July, 1838), a bill to incorporate the Loan Fund Assurance Company passed the House of Commons.[110] From the slight opposition, the *Circular to Bankers* concluded (hastily as will appear in the sequel) that the principle of the bill might be

> taken as an adopted one in our Commercial Legislation. . . the introduction of a principle of extensive range and influence upon various departments of industry and one of especial concern to our large manufacturers. It is neither more nor less than the principle of limited liability for adventurers in commercial pursuits and at the same time giving to an appointed officer of an associated company the power of suing and being sued for debts. . .
>
> The equitable course of proceeding would be to set aside [this particular bill] and comprehend all the advantages which it confers upon one company in some general measure which would be open to all.

The Act of 1837, the *Circular* declared further, was intended to effect this but it was unskilfully framed and failed to accom-

[106] 1 Vict. c. 73. The pertinent sections of the Act of 1825 and the Act of 1834 were repealed as ineffectual.

[107] Cf. note 7 *supra*.

[108] *Laws of England*, V, 751. Also, Lord Eldon in *Davis* v. *Fisk* (1823); *supra*, p. 54.

[109] See *Return of All Applications for Charters*, *P.P.*, LXV (1854).

[110] Cf. *Circular to Bankers* (July 13, 1838). "By what skillful art," this journal inquired, "was this bill, equally obnoxious in principle to its more comprehensive and equal-justice dealing successor, pushed through all its stages in the House of Lords *sub silentio*?" (August 17, 1838).

plish the desired object. "Very few companies [had] availed themselves of its provisions [for it did not] confer upon applicants that corporate authority and exemption from legal risks which they required."[111]

In order "to supply the defects" of the Act of 1837, a new trading companies bill[112] was in fact introduced the following year and pressed by the Lord Chancellor. It met defeat, however. Taking his cue from McCulloch, Lord Brougham heaped vitriolic condemnation upon the measure and carried the Lords[113] with him by a slight margin. Even the Act of 1837 was mischievous, in his view. It had given power to the Crown "to make two or three persons," without an Act of Parliament, "into a trading company." Verily, limited liability was "contrary to the whole genius and spirit of English law, contrary to the genius and spirit of the Constitution"![114] Furthermore, it would "relax that care and vigilance which every partner ought to keep over his associates."[115] Indeed, the new bill would give "a licence to every species of fraud."

"The commercial part of the community," wrote the *Morning Chronicle,* "have little reason to thank God, with Cobbett, that there is a House of Lords, and, above all, a Lord Brougham!" The measure had been "loudly called for by the commercial interest and warmly supported by all sides within the walls" of the Commons. "Hundreds of thousands of pounds of capital, various useful undertakings, depended upon its adoption, and have been suspended in the expectation of its becoming law. Diminished expense to the applicants for charters, increased security to the public that should *not* be improperly conferred, [as in the case of the Insurance Company *supra*] and that should be cheaply obtained were the objects sought. . . . But Brougham and the

[111] July 13, 1838.

[112] *P.P.* VI (1837–38). It should be pointed out that the bill, in fact, amended its predecessor only on minor points. Subsequently, it was referred to as but "a feeble and miserable attempt of the Board of Trade which did nothing more than show that there was no disinclination on the part of the Government to consider the subject and make an effort by legislation to commence with the application of remedies." *Circular to Bankers* (February 14, 1840).

[113] The bill had passed the Commons unanimously; cf. *Morning Chronicle* (August 15, 1838).

[114] Hansard, XLIV (1838), 840.

[115] *Ibid.*, p. 1207 f.

majority of twelve stood in the way of even this reform and the merchants and traders of this country may well exclaim, 'a plague on both your Houses!' "[116]

The *Circular to Bankers* hoped (in vain) that Brougham would see the matter differently in the following session and again advocated the measure on the following grounds:

1. "The growing disposition" to form co-operative societies and companies for trading purposes urgently required "regulation, check and control." The Government should, indeed, "scrupulously mark the boundary where trading associations trench upon commercial enterprise," but it should as well encourage "proper applicants" for charters and protect shareholders from unlimited liability.

2. England as "the great reservoir of accumulated capital" should not be without means for directing its flow advantageously for its possessors, especially in international communication and trade. (American packet companies were a source of alarm.) The best means for "the prompt combination of capital with labour" in such enterprise was the public company with full privileges of incorporation.

3. Furthermore, company organization would facilitate the permanent establishment of great firms built up by individuals but with them, mortal. "Individual industry, economy, and perseverance, persisted through a long life, will raise such works, but when the time comes when their possessors wish to relinquish them, individual enterprise [and sufficient capital in a few hands] is wanting to take them up."[117]

During the period under review, then, the principle of limited liability had vigorous and intelligent support, although again denounced as incompatible with the spirit of English law—as Maitland has said, "*unbeschraenkte Haftbarkeit* was a thoroughly

[116] *Loc. cit.*

[117] August 17, 1838. The risks of partnership, it was urged (*ibid.*, July 13, 1838), were "the most formidable bar" to the conversion of private firms to companies—to the transfer of "overgrown mining and manufacturing establishments to proprietary institutions". The editors vouchsafed knowledge of more than twenty cases, each requiring a capital upwards of £100,000, of which there was "no means of disposing" with the law as it stood.

practical matter which Englishmen could thoroughly understand."[118] Although the identification of "company" with monopoly is found less frequently, prejudice in favor of "individual" enterprise remains in sharp relief.

Even the *Circular to Bankers*[119] declared that: "Nothing should be done by the legislature to weaken the motives for personal industry, economy and thrift. The moral effect of all joint stock associations for mercantile objects which are properly within the compass of individual exertion is bad; they introduce in the place of patient labor and moderate expectations, ambitious hopes and the habit of gambling in shares." The memorial of the Glasgow Chamber of Commerce, dispatched to the Board of Trade[120] just before the passage of the Act of 1837, in protest against "conferring of commercial privileges on associated bodies" either by private act of Parliament or by charter, deserves quotation at length. It supplies succinct evidence in this regard and, as well, suggests the stern opposition to joint-stock enterprise which continued from even the commercial community:

> Respectfully sheweth, That there is no principle of trade which has of late years been so universally recognized as that of the impolicy of granting exclusive privileges to individuals or associations and thus exempting them from the operation of that energy, enterprise, and economy which free competition alone can excite.
>
> That this principle has been acted upon with a boldness equalled only by its extraordinary success, in the breaking up of those great monopolies whose long establishment and vast extent seemed to connect their continuance with the most important interests of the country.
>
> That the only plausible plea on which exclusive privileges have been sought to be defended is that of encouraging incipient undertakings in times when capital was scarce and enterprise languid, but that the history of the past year proves but too clearly that this is a period of redundant capital and excessive speculation and that it is much more necessary to apply a drag than to give a stimulus to commercial enterprise.
>
> That this chamber having uniformly advocated the great principles here referred to and having constantly exerted its humble influence and endeavoured in its furtherance and propagation, is bound to express its regret and surprise at attempts now making to revive the exploded system of privileged trading by proposals for establishing Banks, Steam Naviga-

[118] *Op. cit.*, III, 391.
[119] *Loc. cit.*
[120] *B. T.*, 1/330, fol. 13, no. 72.

tion and Manufacturing Companies, with rights and immunities from which the private trader is sought to be excluded, but which ought in justice and sound policy to be either denied or granted to all alike. We . . . entreat your Honourable Board to resist and oppose all such proposals . . . and to give your sanction to no project which shall restrain the free exercise of talent, and employment of Capital, by each and all . . . without preference or distinction.[121]

Despite all opposition, however, joint-stock enterprise, corporate, quasi-corporate or unincorporate, advanced steadily during this period on a wide front—into older avenues of trade and industry, and into new. Almost a thousand companies (not counting banks) in existence at the passage of the Act of 1844 are accounted for in Table IX.[122]

Table X contains an estimate made by Spackman of "the investment of British capital in Foreign Loans and Public Companies" down to 1843 and quoted then on the London market.[123]

The 105 mining, 107 assurance, and 196 shipping, land, asphalt, loan, salt, and miscellaneous companies with a capital of about £60 million were, presumably, in most cases unincorporate; many of the mining companies were cost-book partnerships[124] with transferable shares. These joint-stock companies engaged in various fields of economic activity, being in language from the Bench, "consonant with the wants of a growing com-

[121] In reply, their Lordships forwarded the following reassurance: "This Board are by no means disposed to sanction the extension either by Act of Parliament or by Royal Incorporation, of any privileges of associated Bodies of an exclusive character or of a nature which may in their opinion prove detrimental to the fair competition of private individuals not so associating themselves." (*Ibid.*, 5/44, fol. 312.)

[122] Classified by Shannon ("The First Five Thousand Limited Companies and Their Duration", *Economic History* [January, 1932]) from *Return of . . . Companies, P. P.*, (1846), XLIII (#504), 3–24.

[123] *Op. cit.*, p. 157.

[124] "A cost-book mining company is formed by agreement. A number of adventurers who have obtained permission to work a lode agree to form a capital, to divide that capital into a certain number of shares, and to distribute the shares amongst themselves. They appoint an agent commonly called a purser for the purpose of managing the affairs of the mine, subject to the control of the shareholders." Cf. Lindley, *Partnership* (1st ed. [1888]), p. 111. Henry Ayres reported in 1857 that "nearly the whole of the mines of this country are conducted on this plan." Cf. his *Financial Register* (1857), p. 397. Jenks, (*op. cit.*, p. 396) suggests that several of the mining companies included in the Table below were organized abroad as *sociétés en commandite.*

TABLE IX

COMPANIES IN EXISTENCE, 1844

	English*	Irish
Coal and iron mines	19	1
Lead, copper, etc., mines	32	6
Quarries	9	1
Smelting, manufacturing ores	8	.....
Railway rolling stock	1	.....
Briquettes and coal by-products	1	.....
Bricks, tiles, pottery	1	.....
Shipping, coastal, etc	46	7
Shipping, ocean	5	.....
Omnibuses, etc	4	.....
Cotton manufacturing	1	.....
Woolen manufacturing	24	.....
Miscellaneous industries	14	.....
Breweries	9	.....
Other food and drink	14	2
Houses, land, and buildings	14	2
Market and public halls	31	2
Colonial: railway	1	.....
Colonial: mines and land	21	.....
Foreign: gas and water	1	.....
Foreign: mines and lands	22	.....
Petty lending	48	.....
Insurance	172	1
Gas and water	224	9
Railways	108	8
Other public utilities and works	84	6
Unclassified	33	2
Total	947	47

* Of the companies given as "English existing," it is probable that the following were merely branches of Scottish companies: 3 railways, 1 coal and iron, 5 insurance.

munity, [had] forced their way into existence whether fostered by the law or opposed to it."[125]

[125] *In re Sea, Fire and Life Insurance Co.* (Greenwood's Case) 2 DeG., M. & G. (1854), 477. Or, in the words of another commentator: "The law of England ever slow to recognize any social change, and accommodating itself thereto only as actual necessity arises, and as it were by compulsion, refused for a long time to acknowledge their existence except as partnerships so numerous that the forms of justice were embarrassed in dealing with them" (Bunyon, *Law of Life Insurance*, 3d ed. [1891], p. 176).

TABLE X

Foreign Securities		£121,501,410
"The Banking Interest":		
Bank of England	£10,914,750	
Bank of Ireland	2,630,769	13,545,519
Joint-stock banks:		
England and Wales	15,000,000	
London	6,433,500	
Ireland	1,850,850	
Scotland	9,619,825	32,904,175
East India Company		6,000,000
South Sea Company		3,662,734
Turnpike trusts		8,774,927
70 Railroad companies		57,447,903
24 Foreign mining		6,464,833
81 British mining		4,500,000
107 Assurance		26,000,000
59 Canal		17,862,445
8 Dock		12,077,237
27 Gas light and coke		4,326,870
11 Water		2,536,122
5 Bridge		2,123,874
4 Literary institutions		1,003,125
72 Shipping companies		.....
24 Land		.....
5 Asphalt		.....
10 Cemetery		25,000,000
15 Loan		.....
1 Salt		.....
83 Miscellaneous		.....
612		£345,731,174

In the Companies Act of 1844, to which we now turn, Parliament drew the first legislative distinction[126] between a joint-stock company and the ordinary partnership, and in return for requirements laid down as to registration made some of the privileges of incorporation generally available. However, the legislature was to intervene not so much for the purpose of giving facilities to companies as to afford a measure of protection to the public.[127] Limited liability did not, in fact, become a matter of general right until 1855.

[126] Cf. Todd, "Some Aspects of Joint Stock Companies, 1844–1900," *Economic History Review*, IV (1932), 47.

[127] Cf. Bunyon, *loc. cit.*

CHAPTER V

THE JOINT STOCK COMPANIES REGISTRATION AND REGULATION ACT OF 1844[1] AND THE RAILWAY BOOM, 1844-46

"The amount of capital now invested in the public proprietary companies, other than joint-stock banks, especially in mining and manufacturing districts," declared the *Circular to Bankers* in 1840, was "so very large as to demand imperatively that the law should step in and regulate their constitution and obligations properly."[2] None the less, the scandalous activities of a type of promoter personified in *Martin Chuzzlewit* (1843) by one Mr. Tigg Montague of the Anglo-Bengalee Disinterested Loan and Life Assurance Company were the immediate impetus and occasion of the appointment, in 1841, of a parliamentary committee "to inquire into the state of the laws respecting joint-stock companies, with a view to the greater security of the public." For fifteen years, "the world had been at the mercy of anyone who chose to publish an advertisement, call himself a company and receive money for assurances and annuities."[3] From 1837 to 1843, some fifteen of such concerns had "commenced and ceased to exist."[4] In a leading article, *The Times* gave vent to the following caustic diatribe on the activities of promoters and "the general management" shown in the concoction of bubbles:

> The merchant, the humbler tradesman, the small shopkeeper, and the servant—these are the people whose little all is sacrificed to the impudent im-

[1] 7/8 Vict., c. 110.

[2] February 14, 1840.

[3] Francis, *Annals of Life Insurance* (1853), p. 252; cf. also his *Chronicles and Characters of the Stock Exchange* (1850), pp. 341 ff.

[4] *Report of 1844*, Evidence, Q. 828. With reference to the outburst of new life offices in 1837–38, the *Circular to Bankers* (September 28, 1838) had inquired: "Can this system of advertising, puffing, bidding against one another for public patronage, keeping the public in utter ignorance of that vital point—the appropriation of fund"—[have any other] than disastrous results?"

postures of our modern joint-stock companies. . . . A system of falsehood marks them from the moment of their birth. They are born and cradled in falsehood. To give them an introduction into society, they are fathered upon unconscious peers and non-existent commoners. By aid of a Blue Book, some dozen merchants and lawyers are appended to the senatorial list, and when this has been done, a miscellaneous body of Tompkinses and Jenkinses is tacked on, in order that no plebeian idealist may be deterred from taking a share by the array of noble names.

Nor is this all: when the number of imaginary Higginses, Wigginses and Thompkinses has been congregated for the purpose of holding hebdomadal meetings—which is effected by a stroke of a pen—then the real business of the speculation begins. A house is taken by the multifarious representative of the nascent company in a part of the town with which he has the fewest possible associations, and where, consequently, he is least likely to be diverted from business by the intrusion of friendly visits, or the more subtle, but not less dangerous interruptions of ancient reminiscences. A part of this house is turned into an office, in front of which is inscribed, in gigantic letters, the title of the association, with the important implication that it is only the north, or the south, or the west, district branch of that establishment. The remainder of the edifice is devoted to the comforts and the luxury of the individual who has undertaken the respective functions of many gentlemen-in-one. As secretary, he has to bow, explain, exhort, encourage, and persuade—to allure coy and shrinking hesitation into the hazards of unfathomable partnership—to stimulate avarice by representations of unimpeachable security, and hope by the promise of boundless wealth—to lull the suspicions of the aged, and rouse the cupidity of the young—to guaranty secrecy and large dividends to all. As director, he must simply lie; lie positively, negatively and collusively—lie by statement, lie by implication, lie by shrug, sign, wink or nod; but always lie. He must affect to dispense shares with a selfish unwillingness, as if he thereby enriched others at a certain loss to himself. When people are inquisitive, he must refer them to piles of letters from distinguished personages offering their patronage and soliciting scrip. If a doubt is hinted at the genuineness of his documents, he is indignant and supercilious, 'You had better call, Sir, on the Duke of Wellington or the Duke of Devonshire, or' any other member of the Peerage (for he has them all under lock and key), is the reply which stifles suspicion, and silences inquiry; or he has another director in a neighboring closet, ready to enter and whisper mysteriously about the expected rise of the share in the market. But these dodges, evincing as they do some adroitness, and demanding no inconsiderable coolness, do not exhaust the ingredients of artifice necessary for carrying on a concern of this kind with success. The Committee slyly observes that it seems the customary practice for the authors and directors of these schemes to give great entertainments to inquisitive neighbors, and to dazzle their minds by a great display. To be sure it is.

This is the crowning stroke of speculative policy. This is the feat in which the master-minds of bubble-blowers revel. Talk of dress or address—of small

talk or big promises—the gift of impudence or the gift of gab;—all of these are as nothing to the efficacy of good dinners. A good dinner combines in itself all the influence of moral and physical power. It is at the same moment a test of culinary art, a cement of social relations, and a stimulus to aesthetical animation. There is no trial so great, no triumph so complete, as that of a good cook. To him belongs the difficult but yet delightful task of distilling from every herb, combining the most hostile sauces, and associating the most antagonist meats—a pleasing of every stomach, and cheering every heart. Compared with him ambassadors in the midst of a grand *coup d'état* and marshals after a hard won field are nothing. He can dissolve the knot of diplomacy and neutralize the force of conquest. *Le ventre gouverne le monde.* Is it wonderful, then, that simple fathers of families and discontented fundholders should yield to the fascinations which the pride of authority and the wisdom of experience vainly resist? Therefore, the multifarious and miscellaneous personage on whose sustaining shoulders devolves the weight of some ambitious joint-stock company—who is secretary, director, and actuary, all in one—never fails to have a good cook, and to give many dinners. The soup dissolves the frost of suspicion; the salmon provokes the first nod of approbation; the champagne unlocks the wariest tongue, and the moselle completes what the champagne has begun; as each successive *entrêmet* files along the dazzling board, the genial sympathies dilate each feature and bosom—caution is entombed in *pâté de foie gras*, and inquisitiveness choked with *crème Italienne.* Then do imaginary dividends dance before gloating eyes—then do gratuitous mines of copper and tin open in soils unconscious of a grain of ore;—then does one hundred per cent. arise from ideal slate quarries, or visionary canals;—then do streams of wealth irrigate the long sterility of Irish bogs; and every miracle is born which avarice can beget upon credulity. Then are the hoardings of years and the pittances of poverty carried to the bourne from which they never can return.[5]

After a lapse of two years from the first sittings (which dealt chiefly with the alleged insurance frauds), the Committee was reconstituted under the chairmanship of Mr. Gladstone, now President of the Board of Trade, and the investigation broadened into a comprehensive examination of the question of the regulation of joint-stock companies in general.

The Report of the Committee, strikingly fresh and modern in outlook and altogether judicious, classified "bubble companies" as follows:

1. Those faulty in their nature: founded on unsound calculations and having no possibility of success.

2. Those which, let their objects be good or bad, were so ill-

[5] March 22, 1844.

constituted as to render it probable that failure incident of mismanagement would attend them.

3. Those fraudulent in object.[6]

Companies of the last class adopted the outward characteristics common to those of the best kind: they exhibited an array of directors, announced a nominal capital, and issued plausible statements, etc. The remedy for this type was "easy": the publication of the names of directors, deeds of settlement, the amount of capital, and other pertinent information would, it was thought, "baffle every case of fraud" which had come under the notice of the Committee, inasmuch as the public would then have "the means of knowing with whom" they were dealing.

In the second class, however, the character and credit of the persons engaged lulled suspicion—directors themselves were often indifferent or careless, and shareholders purchased on the strength of their names, without due inquiry, so that the delusion was sustained for a longer time. Adequate publicity would not meet the difficulties of this type. However, they might be considerably lessened by "the periodical holding of meetings, audit, and publication of accounts, and by making directors and officers more immediately responsible to the shareholders."

On the other hand, companies of the first class (those faulty in their nature) were "beyond certain cure by the legislature. . . . No antecedent check would avail; any authority appointed to act as censor would be as liable to be deceived as the promoters of the scheme, and it might sometimes sanction bad, and at other times, good schemes."[7] Or, as Gladstone himself put it to a witness before the Committee, would not such an investigation "increase the faith of the public in the solvency and efficiency of the company?" Would it not also be "an almost impossible task to make such an inquiry as would tend to the real security of the

[6] *Report of 1844*, pp. 3 ff.

[7] The provisions of the recent Securities Acts in the United States suggest that the dangers inherent in prior scrutiny by a governmental body were either less fully apprehended or more fully discounted by the authors of those Acts than by Mr. Gladstone.

public?"[8] In this matter, the Committee again placed reliance upon publicity—of the prospectus, in particular. Furthermore, it urged that exposure and dissemination of instances of failure would serve to improve "public opinion and public conduct," and in some measure to "counteract the susceptibility of ignorant persons" to delusion. The greatest benefit, however, would probably be derived, so it was thought, from the opportunity thus afforded to those "professionally employed in making investments to learn more easily and accurately the real nature of these companies."

The Committee's recommendations, then, were directed towards preventing "the use of Joint Stock Companies as mere instruments of share-jobbing;" in sum, to the establishment of means to insure: (1) sound regulations for the constitution of companies at promotion; (2) publicity throughout the whole course of the proceedings.[9] It was hoped thereby to narrow the range of mischief produced by "periodical paroxysms" of speculation.

Not the least of that series of brilliant legislative achievements which altogether made Peel's administration of office so memorable, was the Joint Stock Companies Registration and Regulation Act of 1844. Indeed, the advent of his "great conservative government," to quote Morley, "definitely marked the rising dawn of an economic era."[10] In that era, corporations, both quasi and fully fledged, were to play an increasingly dominant part in the country's economic advance. The Act of 1844 marks an epoch in the history of English company law. In giving a statutable position to joint-stock enterprise,[11] it recognized a powerful instrument for the organization and application of capital. In implementing Gladstone's basic insight, adequate know-

[8] *Report of 1844*, Evidence, Q. 795.

[9] Gladstone, *ibid.*, Q. 851.

[10] *Life of Gladstone*, Vol. I, p. 247.

[11] The Companies Clauses Act of 1845 (8/9 Vict. c. 16) governed companies incorporated by *special* Act of Parliament in so far as such Acts did not specially except. Its provisions became the basis of *Table A* of the Act of 1862 (cf. *infra*)—the basis of modern articles of association—and were derived in considerable part from various earlier charters, private acts and deeds of settlement.

ledge for the investor, it initiated the policy of publicity[12] which by gradual evolution has become an outstanding and progressively more pronounced characteristic of company regulation in England. Since, legislation has amplified, clarified and extended that of 1844. On several occasions, actually, it has restored some salient provisions thereof which were subsequently emasculated under the aegis of doctrinarian *laissez-faire*. In the main, the framework of today's statutory requirements for concerns formed under general laws has been reared upon the substratum then moulded.[13]

The Legislature, as we have seen, had for long been "unreasonably jealous," in the words of John Stuart Mill,[14] of joint-stock associations; the Courts, likewise. As the *Circular to Bankers*, discussing a current case which involved the British Iron Company, remarked in 1840: "We have observed in other Courts, as well as those of strict equity, a growing jealousy in the minds of the Judges of the assumed powers and rights of Joint Stock Companies, and evident bias in favor of individuals in contests between these parties, . . . and we imagine that this disposition has arisen from the conviction that the new practice, new in its extension . . . and adaptation to all sorts of commercial enterprises, has been introduced in England without those safeguards against abuse . . . [enacted] in other countries."[15]

What it could not suppress,[16] Parliament now, in the public interest, proceeded to subject "to general inspection and regulation."[17] In testimony before the Committee it had been argued

[12] The preamble to the bill may be quoted in point: "Whereas it is necessary that due publicity be given to the objects, nature and constitution of Companies, the names of their Members, their capital and liability." Cf. Gladstone in the House of Commons (Hansard, LXXV [1844], 277); and *The Times* (July 4, 1844): "Publicity is all that is necessary. Show up the roguery and it is harmless."

[13] Cf. B. C. Hunt, "Recent English Company Law Reform," VIII *Harvard Business Review* (January, 1930), 170–183, *passim*.

[14] *Principles of Political Economy* (1848), V, IX, 57.

[15] February 14, 1840.

[16] To make all companies illegal which did not register deeds, etc., was "perhaps all that [could] be done to prevent fraud, unless unincorporated joint-stock companies were to be rendered illegal; but it would be useless to attempt such a measure" (*Report of 1837, loc. cit.*).

[17] Hansard, LXXV (1844), 475 f.

that: "Inasmuch as transferable shares become in a measure part of the circulation of the country, and as there will always be an extensive class of buyers and sellers of shares thus made publicly vendible by sanction of law, many of which buyers and sellers will be . . . inexperienced persons, it is the duty of the legislature to keep some degree of control over the birth and course of life of joint-stock companies, having reference to the different objects for which they may be formed."[18] His measure, Gladstone stated to the House of Commons, was "not intended to give an indiscriminate encouragement to companies, nor on the other hand, to impose burthens or restraints upon them other than such as were necessary or were manifestly to the public benefit." He proposed to apply "the most wholesome remedy for a public evil . . . that of giving a power of public opinion."[19]

The Act of 1844[20] required registration of all partnerships (except in banking)[21] having more than twenty-five members and freely transferable shares. Companies became legal for purposes of promotion by a *provisional* registration; before the issue of a prospectus or the acceptance of deposits on shares, various particulars had to be returned.[22] Upon complying with further re-

[18] *Report of 1844*, Evidence, Q. 2256.

[19] Hansard, LXIII (1844), 1755.

[20] Clapham's statement (*Economic History of Modern Britain*, Vol. II, p. 135, note 2) that the legislation of 1844 "had mainly railways in view" is obviously incorrect.

[21] Separate provision was made for banks by the Joint Stock Bank Act of 1844 (7/8 Vict. c. 113), under which no *new* banks were to be formed except by Letters Patent to be granted on report of the Board of Trade. The Act expressly provided that such incorporation was not to limit liability and laid down various requirements, *re* publicity, etc. "The tacit influence of a better system," Peel thought, "would compel the adoption by the old companies of similar principles—and thus purify the whole system, old and new." (Cf. letter to Gladstone, April 23, 1844, *Peel Papers*, Vol. CCXC.) Liability of shareholders was debated again in the House (Hansard, LXXVI [1844], 1178 ff.). Clay reiterated his position of the thirties (*supra*): The credit of banks with unlimited liability, "grounded on the private fortunes of the shareholders, [was] utterly spurious . . . commensurate not with assets which were but assets that were not, available at need." Peel opposed limitation. Clay's argument proved decisive a decade later (*infra*).

[22] This salutary provision (Sect. 26) was dropped in the Act of 1856 (*infra*). Cf. the *Report of the Royal Commission on the Stock Exchange* (P. P. XIX [1878], 19). The Commission strongly recommended its reintroduction in view of "the overwhelming proof that . . . dealings before allottment constitute the principal means by which fraudulent loans and companies have been hitherto rendered possible."

quirements as to filing of deeds of settlement, etc., *complete* registration was achieved; a company became duly constituted for carrying on its business and endowed with all the privileges incident to incorporation except limited liability. Half yearly returns of members and their holdings were to be made. Directors[23] were to cause "a full and fair balance sheet to be made up" and to approve it before delivery to auditors. Indeed, the appointment of auditors "to receive and examine the accounts" was made prerequisite to provisional registration.[24] As the Committee had emphasized in its report, "periodical accounts if honestly made and fairly audited, cannot fail to excite attention to the real state of [a] concern." The balance sheet and auditors' report were to be filed with the Registrar of Companies.[25]

English law continued to preclude limited liability as a matter of general right. The Committee did not recommend its introduction, in part, one suspects, because of a feeling that no added inducement was necessary to encourage company formation.[26] Indeed, it has been said with justification that "the Legislature was induced to interfere in passing the Act [of 1844], not for the purpose of giving facilities to the creation and operation of [those] bodies; but for the protection of the public."[27] However, it is

[23] The following interesting view of the position of a director was advanced by a prominent witness (and company solicitor) before the Committee: "The whole proceedings of directors towards proprietors should be a matter of trusteeship, as between trustees and strangers and should not be as between partners and partners." (Cf. *Report of 1844*, Evidence, Q. 2093.)

[24] One auditor at least was to be appointed annually by the shareholders in general meeting. Similar requirements were included in the Companies Clauses Act of 1845 (*supra*). For the development of the position of the auditor, cf. *infra*, p. 140 ff.

[25] The *Report of the Select Committee on Assurance Associations* commented in 1853: "One of the chief securities contemplated by the Act of 1844 for the safety of the public is the duty imposed upon them to return annual balance sheets representing the state of their affairs . . . they are open to public inspection. But from the fact that the Act prescribed no form, and furnished the Registrar with no power to enforce a compliance with the spirit, or even with the letter of the law, it appears that this provision has been very imperfectly complied with in many cases, and in others altogether neglected; so that it cannot be said that it has afforded, in the majority of cases, either the information or the security which was intended" (*P. P.* [1852–53], XXI, iii).

[26] Cf. *Report of 1844*, Evidence, QQ. 1522–26. The Committee considered the partnership *en commandite* beyond the scope of its reference.

[27] Bunyon, *Law of Life Insurance*, 3rd ed. (1891), p. 176.

worthy of note that a decade later, when the question had flared up into what may be reasonably termed a glowing public issue, Gladstone wrote the following to the Lord Chancellor: ". . . at a former time I presided over a Committee the inquiries of which led me to the conclusion that a relaxation of the present law might be desirable."[28] Moreover, the testimony taken by the Committee contained weighty argument for its introduction at this time.[29] In its absence there was, as one witness declared, a most serious difficulty in obtaining respectable and responsible directors: "The law is so dangerous and unjust towards a man of substance, by putting his whole property at the mercy of other persons beyond his control, if he does join a joint-stock company, that very few men of respectability can be found to occupy so perilous a position. At present, if a man becomes a director . . . he must make up his mind to become a partner with hundreds of people whom he may know nothing about, . . . he can have but one vote . . . and under the partnership law is liable for the acts of copartners."[30]

Even before the Act of 1844, as we have seen, the large old-fashioned partnership had to some extent been metamorphosed into a more workable piece of machinery. In some cases, legal ingenuity had produced substitutes for corporate incidents when such were actually denied by the Legislature. For example, on the refusal of Parliament in 1837 to grant to the Westminster Bank the right to sue and be sued in the name of the company or of its officers, the ancient trustee device was invoked and put to use for the purpose.[31]

[28] Gladstone to the Lord Chancellor, December 1, 1854; cf. *Gladstone Papers.*

[29] Evidence, *loc. cit.*; also, QQ. 2072–2124.

[30] *Ibid.*, Q. 2072.

[31] Levi, *History of British Commerce*, p. 209. An interesting instance of what has been termed "the business practice of using the limited supply of legal forms for unlimited varieties of needs." (Cf. Isaacs, "Business Security and Legal Security," *Harvard Law Review*, XXXVII [1923–24], 213.) In 1810, Lord Ellenborough had stated in *Metcalf* v. *Bruin* (XII East 405–6): "We could not indeed invert the rules of law to enable persons to sue as a body or a company who are under no difficulty of suing upon it in their own names [the bond then could inure to the benefit of the fluctuating body]. The persons constituting this company [The Globe Insurance Company] laboured under an imperfection to contract, from

In the decade now under review, there is more than the scattered evidence found in earlier years[32] of varied efforts to *contract out* of unlimited liability. In the first place, by agreement among the members of a company, it was attempted to restrict their liability to outsiders, who were presumed to have due notice.[33] In deeds of association it was "always" stated, according to a witness before the Committee, that shareholders should be liable for only the amounts of their subscriptions.[34] This avenue of escape was in fact blocked by the courts. Such a clause was held "to militate against the principle of partnership as hitherto understood in this country . . . that every person engaged in a partnership is liable solidarily, as they say upon the Continent, for everything . . . These companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed by it; they have not, however, proceeded to the extent of enabling their members to enter into arrangements absolving themselves from liabilities without the circle of their own deed, that is from liabilities to third persons."[35] Nevertheless, the risks of bankruptcy might be lessened in some instances by stipulating that the company should be liquidated before its capital was absorbed by losses—"by such a clause, frequently resorted to in England, the principle of unlimited responsibility was in some degree neutralized."[36]

However, there was another and less difficult mode of evasion. As Maitland has written: "If a man sells goods and says in so many words that he will hold no one personally liable for the price, but will look only to a subscribed fund, must we not hold

the fluctuating nature of their body, and therefore, they constituted seven persons to be trustees for them; and whether those seven were members of the body or not is for this purpose indifferent."

[32] *Supra*, pp. 33-4; 72.

[33] Cf. Carr, *General Principles of the Law of Corporations*, p. 108.

[34] *Report of 1844*, Evidence, Q. 2073.

[35] *In re Sea, Fire & Life Assurance Co.*, (1854) *op. cit.*, pp. 475-7; cf. *in re Athenaeum Life Society*, 4 K. & J. 517.

[36] Coquelin, "Commercial Associations in France and England," *Hunt's Merchants' Magazine* (1845), Vol. XII, translated by H. C. Carey from the *Revue des Deux Mondes* (1843).

him to his bargain? Our courts were very unwilling to believe that men had done anything so foolish, but they had to admit that personal liability could be excluded by sufficiently explicit words."[37] In some *trading* companies, we find that directors actually did put a clause in all of their contracts which stipulated that all parties "should look for payment to the capital stock of the company only, and not to the shareholders or directors."[38] Moreover, in the policies of the non-chartered insurance companies, such a clause was "inserted universally."[39] In 1852, such contracts were held good[40] "in the very teeth of the government and the legislature."[41]

Furthermore, resort was had at times to other devices in order "to avoid partnership, and yet allow capital to assist enterprise and invention"; enterprising promoters could still "get the money." Under the revised usury laws, a loan might be arranged for *any* period, "upon a bond or engagement other than a bill [such as a warrant of attorney] at a high rate of interest such as might be got if one entered a firm as a partner. . . . If any danger were seen, the lender could put his security into force."[42]

Despite the failure, then, of the Act of 1844 to make limited liability generally available, and in the face of obvious inconveniences, the difficulties were in a measure being overcome. "The enemy was within the citadel," to quote Maitland. However, development of this kind ceased in 1855 when, "if the State had not given away, [England would have had] joint-stock

[37] *Op. cit.*, p. 392.

[38] *Report of 1844*, Evidence, Q. 2073. Cf. art., "Limited or Unlimited Liability," *Economist*, XII (1854), 698–700; and *Report of Select Committee on Assurance*, *op. cit.*, Q. 676.

[39] Report of 1844, Evidence, Q. 2075; *Economist*, *loc. cit.*

[40] In *Hallett* v. *Dowdall*, XXI L. J. Q. B. 107. Since 1824, the following clause had been inserted in all policies of the Marine Insurance Company (which in the fifties was doing "a larger marine business than any other office"): "The capital stock and funds of the company shall alone be liable . . . to make good all claims under this Policy: no proprietor shall be liable beyond the amount of his shares . . . it being one of the original and fundamental principles of the company that the responsibility of proprietors shall in all cases be limited to their respective shares in the capital stock." Cf. *First Report, Royal Mercantile Law Commission* (*op. cit.*, Appendix, pp. 119 f.).

[41] Cf. *Eclectic Review*, *N. S.* (1852), IV, 77.

[42] *Report of 1844*, Evidence, Q. 2085.

companies, unincorporated, but contracting with limited liability."[43] Indeed, in view of the apparent extent to which such practices had been carried, *The Economist* was disposed to underestimate the importance of complete freedom of incorporation when it was actually realized under the Limited Liability Acts of the middle fifties.[44]

* * * * * * * *

Gladstone wrote prophetically in the spring of 1844: "I have a feeling that . . . circumstances connected with the state of the commercial world will undoubtedly subject present legislation to a very severe and early trial."[45] Two years later, he declared: "I suspect that with regard to Joint-Stock Companies and Speculation we are a nation of children who will not allow our nursery maids to govern us."[46] In the interim, England experienced one of the great booms of her economic history, aptly characterized at the time as "the railway mania."

The depression which had hung over British trade and industry for almost seven years[47] following the collapse of 1837 was not only widespread, but bitter in the extreme, undoubtedly the most severe which thus far had darkened the new industrial day. In the words of a contemporary, its "long agony almost 'infinitely' surpasses in vital importance any commercial convulsion since the peace [with] 'hope deferred'—exhausting struggle—patience sinking into despair—capital melting away—profit absorbed—wages reduced—and universal pauperism, all characteristic."[48] Although analysis of the many factors involved is beyond our immediate province, brief mention, as bearing upon the causes of the depression, should be made of some of the results of the company promotions of the thirties.

[43] Maitland, *op. cit.*, *passim.*
[44] *Loc. cit.*
[45] Letter to H. B. Ker, May 6, 1844.
[46] Letter to A. S. Finlay, May 13, 1846.
[47] Thorp, *Business Annals*, pp. 160–1.
[48] *Morning Chronicle* (January 8, 1844).

As might be expected, a great number of the projects were disappointing. Domestic mining companies, for instance, proved "for the greater part,—complete failures."[49] We have seen that in view of the difficulties currently experienced by iron companies, doubts had been cast upon the probable success of company organization in that field. Several of the newer and some of the older joint-stock banks broke up[50] during "the terrors" of '39 and '40. A multitude of miscellaneous promotions sank without trace. The railways, however, were a marked exception. As *The Economist* wrote in 1845, "of all the schemes which originated in the speculative period 1835–36, they were the only ones which stood the test of the succeeding pressure without any disastrous losses."[51] Several, including the London and Birmingham and the Liverpool and Manchester, returned dividends of ten per cent or more by 1840; a number of others, six per cent or better.[52] And even "before the period of legitimate dividends began, interest had been announced on capital, as a breakwater against the ebb of the epidemic" (of the thirties).[53] By 1844, railways had earned "a reputation for security and profit."[54]

To this success and apparent stability, which loomed large against a background of general economic distress, was traced "the origin of the very favorable reception"[55] which fresh railway enterprise met when times took a turn for the better. In fact, renewed activity in railway promotion seems to have been the detonator which broke the spell of depression and initiated a general revival. In various earlier periods, "when confidence was restored, enterprise had taken the direction of Joint Stock Companies. It did so in 1824; and in 1834–36; . . . again in 1844–45, recovery takes exactly the same direction." The *Circular to Bankers* continued:

[49] Cf. Samuel Salt, *Statistics and Calculations*, Manchester (1845), p. 45.

[50] Cf. [Daniel Hardcastle, jun. (pseud.)], *Banks and Bankers*, 2nd ed. (1843), Appendix, *passim*, for a list of failures. Cf. also *The Economist*, III (1845), 310.

[51] *Loc. cit.*

[52] Cf. Scrivenor, *The Railways of the United Kingdom Statistically Considered* (1849), Appendix, pp. 58 ff.

[53] *Morning Chronicle, loc. cit.*

[54] *Economist*, VI (1848), 1297.

[55] *Ibid.*, III (1845), 310.

At the first of these epochs associations were for mining enterprises in South America; at the second they were for banks both here and in the United States; [now], they are railways. It would seem from this view of the subject, that individual enterprise is as active in the minds of our countrymen as ever, but having been so frequently checked, thwarted, and mortified in its exercise individually, it seeks the support and strength of numbers in association for large undertakings. This is a curious and novel feature in our national character, and the cause which produces it will produce similar effects in other and new channels . . . All public enterprise at this epoch takes the direction of Railways, protected [by limited liability] . . . There is nothing like these three extraordinary developments of speculation to be found in our commercial history. The canal enterprises of sixty or seventy years ago were objects of local interest and limited speculation almost unknown to the London money market; and the bubbles of 1720 were most of them absurd, and as ridiculous as betting upon the race of two maggots tumbled out of a bad nut—very different from the Joint Stock enterprises of our day, the majority of which, if not all, are for useful undertakings.[56]

In January of 1844, with "the coffers of the Bank of England choked with bullion," the editors of the *Morning Chronicle* had despaired: "For two years our capitalists have been anxiously waiting for a revival of trade and commerce. . . Profitable investment there seems to be none. The rate of interest continues to decline. The Funds maintain an unnatural buoyancy. Deposits in savings banks are rapidly accumulating."[57] However, before the end of that eventual year, they were deeply concerned over the headlong rush of capital into railways:[58] "There must be some weeding somewhere; and if the crop is not dealt with, as young turnips are, without any over-tenderness, we will not answer for the consequences on our monetary system."[59] Or again, "capital clamours for profitable investment; confidence has become eager, and may shortly become blind; railroads pre-

[56] July 11, 1845, in a discussion of the Parliamentary lists of subscribers to new railways (cf. *infra*).

[57] January 22, 1844. In February, Gladstone told the House of Commons that unemployed capital abounded to a degree almost unprecedented and that there could be no doubt that its investment "would take a direction towards the extension of railways." Cf. Hansard (1844), LXXII, 233. The market rate of interest on the discount of unexceptionable bills had declined from 4½–5% in 1841 to 1¾–2½% in 1844. (Tooke, *op. cit.*, IV, 60.) The "Three and One-Half Percents" had been converted into "Three Percents." In fact, *Consols* returned to par in 1844 for the first time in a century. Cf. *Bankers' Magazine*, III (1845), 73 f.

[58] October 15, 1844.

[59] October 11, 1844.

sent the first tangible form of investment, but anything is acceptable which promises the most ordinary return. General prosperity begins to bear its prolific brood of speculation . . . the public which, but the other day buttoned up its pockets is now becoming eager to embark in any scheme."[60]

One of the great economic facts of the forties, as well as the dominant episode in joint-stock promotion during that period, was the swift and vast expansion of the railway network, "the industrial revolution incarnate,"[61] to the accompaniment of a boom of colossal proportions. "The country," wrote *The Times* in 1845, "seems in a fair way to be laced all over with iron within a very short period."[62] On January 1, 1843, there were less than two thousand miles of railway open to traffic. By January 1, 1849, there were "five thousand miles in round numbers"[63] and promoters had obtained legislation which sanctioned another seven thousand. "The companies crowded to Parliament with their projects; fought with each other for districts, as fields of enterprise, like so many contending armies."[64] In the five years from

[60] October 12, 1844.

[61] In Professor Gay's apt phrase.

[62] July 18, 1845.

[63] Lardner, *Railway Economy* (1850), p. 54.

[64] Morrison, *The Influence of English Railway Legislation on Trade and Industry* (1848), p. 22. Although the controversy over government regulation of railways is beyond the immediate interest of this Chapter, it may not be altogether inappropriate to cite at this point some contemporary opinions on the question. Gladstone wrote (February 19, 1845) to Goulbourn (Chancellor of the Exchequer): "I think there is little force in the popular argument that private parties are the best judges as to the expenditure of their own capital when applied to these companies under present circumstances." Discussing the speech of an ardent advocate of regulation (Morrison, the author cited) in the House of Commons, the *Morning Chronicle* (March 22, 1845) declared: "The railway system is striking its roots deeper and deeper every day into the whole field of social life. A new and enormous power is growing up under the sanction of law and it is a matter of vital importance to all that this power should be exercised under wise restraints. It may be true that private enterprise is the source of our greatest industrial triumphs, but experience shows that the energy of speculation is not checked or impaired by the prescription of conditions which leave a prospect of profit." Morrison had introduced resolutions which called particularly for fixing maximum rates. He complained that Parliament was "rearing a new monopoly—more formidable, more injurious" than any it had ever combated (Hansard [1845], LXXVIII, 1222). The conservative *Circular to Bankers* (March 20, 1846) held "the two most flagrant errors of statesmanship in our domestic affairs committed by our rulers in the

January 1, 1844 to December 31, 1848, the total capital actually raised for railroads rose from sixty-five to over two-hundred million pounds.[65] Well might a contemporary write: "The railway system, whether it be regarded as a means of lessening the cost of production, and increasing and cheapening the power of distribution, as an evidence of social advancement, or as an object for the investment of capital, is undoubtedly one of the most interesting topics of the day."[66]

Important correlatives of this, the second major stage of English railway development were: first, participation of investors in numbers[67] which seem to dwarf those of any earlier era of speculation,—in Jenks' phrase, "the democratization of the money

present century: 1. their refusal to adhere to a depreciated currency until at least one-half or two-thirds parts of the debt in which depreciated currency it had been contracted should be discharged; and then a proper scientific adjustment of the standard of value upon a metallic basis; 2. the *laisser-faire* principle applied to the new element of national strength and economic power, the system of railways; a system which obviously required the interposition and regulation of Government as imperatively as the police system or the Post Office." In sharp contrast, there may be cited the views of the *Railway Register* (1845): "It is a sound maxim of our constitutional practice and it is one which abstract theory and reasoning approve as much as the result of experience, to leave such things, all matters of enterprise and trade, and all matters of individual action, as much as possible to themselves, feeling assured that they will work themselves right much better than any Government Board can do it for them." Sir Robert Peel (replying to Morrison) straddled: "It was impossible not to feel that competition in the case of railways did not give that perfect security as to charges which was afforded by competition generally in other undertakings. . . . . If a railway company now established, and having a monopoly, adopted exorbitant charges, a long preparatory system of concert and consideration was necessary before a competitor could enter the lists. . . . Though the question of controlling the charges of railway companies was one of great importance, it was encompassed with numerous difficulties. . . . It was difficult to say what was the proper check. . . . It must be remembered that it was necessary to hold out inducements which would lead men of capital to embark in such undertakings. . . . The case [of railway charges] might be rather special; but he doubted whether it was so special as to justify departure from the rule to be applied in other cases" (Hansard, *op. cit.*, 1231 f.).

[65] Scrivenor, *op. cit.*, p. 41; Lardner, *op. cit.*, pp. 56–7.

[66] *Circular to Bankers* (June 27, 1845.)

[67] Returns filed in 1845 reveal that upwards of £21 million had been subscribed in sums of less than £2,000 by more than 20,000 individuals; 5,000 others had subscribed in amounts upwards of £2,000 (cf. *P. P.*, VI [1845], #317 and #625). With reference to a subsequent return, *The Times* (August 13, 1846) exclaimed: "We are a nation of plethoric capitalists. . . . A subscription tax instead of an income tax would abolish our customs".

market;"[68] secondly, the expansion of that market geographically, by the concurrent rise of stock exchanges in various provincial centers; and finally, with the addition of railway securities to the traditional media of investment, the creation of a much broadened base of equities for the purchaser of income—the growth of negotiable investments. *The Economist*[69] declared that railway property was a new feature in England's social economy which had introduced commercial feelings to the firesides of thousands. If promoters elbowed each other in the pursuit of incorporation from Parliament, investors tumbled over one another in a mad scramble to secure a share in the golden harvest. "In every street of every town," wrote Tooke, "persons were to be found who were holders of Railway shares. Elderly men and women of small fortunes, tradesmen of every order, pensioners, public functionaries, professional men, merchants, country gentlemen—the mania had affected all."[70] *The Times* observed that the clergy were almost wholly forsaking scripture for script.[71] "Everybody is in the stocks now," wrote the *Glasgow Citizen*:[72]

> Needy clerks, poor tradesmen's apprentices, discarded serving-men, and bankrupts—all have entered the ranks of the great monied interest. Persons to whom Goldsmith's village preacher [is] a Croesus, bravely pledge themselves in black and white. . . . The genius of modern speculation, armed with a hollow scroll for a truncheon, effects more conquests than ever were achieved by the sword. . . . The notion entertained by antiquated persons that a man cannot coin without capital, arises from the supposition that an undertaking must be completed before it begins to yield profit. Completed! why it need not even be commenced! He is a pitiful greenhorn who cannot draw actual revenue from projects air-fashioned in the realms of dreamland. Water-pipes, the iron for which is not yet molten—railways mapped out only in the engineer's brain—fields of minerals where never a

[68] *Op. cit.*, p. 131, and cf. Chapter V, *ibid.*, *passim*. As *The Times* wrote (July 15, 1845), "The Browns, the Joneses, and the Smiths are the men to whom England is indebted for the millions which are required" for the railways.

[69] Vol. III (1845), p. 310.

[70] *Op. cit.*, Vol. V, p. 234.

[71] Quoted by *The Economist*, *op. cit.*, p. 970. Or 'scrip'—"the name given to the provisional certificates which on a new issue of government bonds or debentures or shares are handed to the subscribers and are subsequently exchanged against definite certificates. They may be issued to bearer, in which case they are treated as negotiable securities" (*Dictionary of Political Economy*, [1926], III, 369).

[72] Quoted by *The Economist*, III (1845), 601.

shaft has been sunk—or shining rows of imaginary tombstones—suffice abundantly for mere purchase and sale. Our souls are steeped in the unrecognized poetry of the age, and of imagination's vapoury shapes, we contrive to make solid merchandize. Prospectuses, purely ideal, become on the stock-exchange a source of substantial wealth. . . . Who is there so poor of spirit as to climb with bleeding ankles the thorny step of fortune when he can thus top it by balloon flight at once? . . . It is no longer the sun or the frost which makes man hot or cold. The temperature of the blood is regulated by the stock exchange barometer. It is warmed by the excitement of gain, or chilled by the mortification of loss. Society is agitated by a thousand games of chance—*stocks* rise and heads are uplifted—or *stocks* fall and chins droop as leaving scarce neck-breadth for a halter.

The rapid growth of provincial share markets was a notable phenomenon of this period. "Glasgow and its merchants were in a frenzy, Liverpool and its exchange in semi-dementation—the West Riding in a state of incipient exhaustion, and unable to carry on the wool trade and the railway trade together."[73] Regularly organized establishments of share brokers arose in nearly every town of more than 10–20,000 inhabitants.[74] The President of the Liverpool Exchange reported a generation later that business grew so rapidly in times like 1836 and 1845 "that we associated ourselves and hired a room in which to meet."[75] Manchester and Glasgow both organized in 1844.[76] As a contemporary observed, "this new river of speculation which is flowing through the fields of investment . . . has created for itself a great number of large markets. The Thames and the Mersey created the market of London and Liverpool for commodities; but the railway speculation has created the market for shares of Leeds, Wakefield, Bradford, Halifax, Huddersfield, Leicester, Birmingham and many other inland towns."[77] Disraeli's subsequent commentary in *Endymion* is in point. "What is remark-

[73] *Morning Chronicle* (April 7, 1846). In addition to daily quotations from London, the *Chronicle* reported those from the Manchester, Liverpool, Bristol, and Dublin "share markets."

[74] *Quarterly Review*, LXXXI (1847), 253. The number of brokers at Leeds grew from a dozen in the autumn of '44 to 2–300 by the following May (*ibid.*). The *Leeds Mercury* (quoted by *The Times* (February 28, 1845) spoke of "our three Stock Exchanges."

[75] *Report of Select Committee on the Stock Exchange, op. cit.*, Q. 7878.

[76] *Ibid.*, QQ. 8013; 8093.

[77] *Circular to Bankers* (July 11, 1845); cf. *ibid.* (December 28, 1849).

able in this vast movement," he wrote, "is that the great leaders of the financial world took no part in it. The mighty loan-mongers, on whose fiat the fate of kings and empires sometimes depended, seemed like men who, witnessing some eccentricity of nature, watch it with mixed feelings of curiosity and alarm. Even Lombard Street, which was never more wanted, was inactive. . . . All seemed to come from the provinces, and from unknown people in the provinces."[78] *The Times* was to complain:

> It has long been distinctly foreseen in London that the provincial Stock-markets . . . must prove a source of considerable embarrassment at some time or other to this market and that prediction is now in course of fulfillment. A Stock-exchange such as now existing in the city may be pronounced a necessary appendage to a great commercial metropolis, and it has constantly been of more use even to the mercantile interest, in facilitating the instant conversion of any amount of public securities into money, and producing public securities on the other hand, for investment of money; while to brokers and capitalists the access to the jobbers who belong to it has been of a still more important character. But the London Stock-Exchange, while it facilitates real business, has also promoted gambling, and so far has become a great, though not an unmixed evil. In the great provincial towns these marts for trafficking in stocks and shares were not at all called for, as real business could be transacted through any local banker with little delay, and on as good terms as in London. Hence they degenerated into mere gambling, and were principally instrumental in fomenting all over the country the fatal passion for speculating in railways. The evil has thus spread to a far greater extent than it could otherwise have done. When prices continued to rise in London, all went well with them; but the late reverses have totally paralyzed them, and proved them destitute of all resources . . . There should be a general agreement among the reputable classes in the principal towns either to put down this nuisance, which is enough to corrupt the morals of all the people, or else to make it subject to such strict regulations as will wholly deprive it of its gambling or dangerous character.[79]

The Economist, as yet in publication for less than two years, doubled the number of its pages in 1845[80] with the inauguration

[78] Quoted by Jenks, *op. cit.*, p. 130.

[79] City Article (November 14, 1845).

[80] *Op. cit.*, p. 949. Hyde Clarke in the first volume of his *Railway Register* (1844–45), p. 4, wrote briefly on "the history of the Joint Stock Press." The oldest of existing journals was Henry English's *Mining Journal* (*supra*). The *Railway Magazine* had been founded in 1834. A large number of other periodicals devoted to security reporting, etc. budded and blossomed during the mania. The *Morning Chronicle* complained (October 6, 1845) that brokers' share lists were growing into newspapers and newspapers would "by and by be volumes."

of its "Railway Monitor." The editors were convinced that, however the current excitement might end (and their warnings to speculators were also anything but thinly veiled),[81] railways would not only be the object of enormous and permanent capital investment henceforth, but their debentures would also become security for short advances "equally as eligible as exchequer bills or consol warrants." They estimated the current annual savings of the country at approximately £60 to 70 million. Although they doubted whether prior claims thereon[82] would allow a margin sufficient by any means to meet the voracious demands of prospective calls on railway shares, they did not overlook "two circumstances which had set at liberty an enormous amount of capital for the extension of commerce and other profitable undertakings: "1. the far more perfect banking system introduced of late years and its extension . . . throughout the country. By this means an incalculable amount of capital, . . . formerly dispersed among the community generally in moderate sums, has of late, by the practice, now almost universal, of keeping bank accounts and making payments merely by transfers from one banker to another by the use of cheques, been brought together and a large sum rendered productive which was formerly idle; 2. the extraordinary effects of the railways themselves, and other means now used to facilitate the transit of goods—and save the time of travellers."[83]

The following commentary of the *Circular to Bankers* on the development of the money market deserves quotation at length:

> There are some changes to be observed relating to investments in public securities which appear to us to have commanded too little of public attention . . . Formerly borrowing in public 'money markets' was confined

[81] *E.g.*, Vol. III, pp. 310; 999.

[82] The *Morning Chronicle* (October 9, 1845) commented: "It would be a great error if we were to consider that the full amount of these annual savings could be appropriated to any one pursuit. The population and commerce of the country, both rapidly increasing, necessarily require an increased application of capital. The extensions and improvements of our towns and cities absorb their quota of these savings; and the draining, planting and other improvements of our land require another considerable portion."

[83] *Ibid.*, p. 310.

almost exclusively to governments . . . In our case, as well as in the case of most European Governments, state borrowing became at once identified with the principle and practice of banking. In England, indeed, it formed the foundation of Banks and the shares of loans to the State—being things in which Banks deal—led of necessity to the establishment of an open daily market for their sale and purchase.

This is what we call 'the money market'; no very precise and definite term, for it is not so much a market for the sale of money as for the disposal and exchange of capital . . . From this indefiniteness, indeed error of term, have arisen consequences which it is necessary to explain. It gave the Bank and the London Bankers and brokers a sort of monopoly, and exclusiveness of privilege, in allowing to be sold, and in dealing in, that thing only which from habit they pronounced to be fit for their 'money market'; they had money and wanted to dispose of it profitably. Whatever the Government chose to put out . . . was at once stamped as the thing of standard value. So also Bank Stock and East India Stock, because these too were put into the market by what we may call branches of the sovereign power. From the first formation of an organized daily money market it took more than a century to break down this monopoly, and to render shares of other things as familiar to the frequenters of that mart as Bank and East India Stock and Government debts. The South Sea Bubble was an ephemeral thing which contributed, by its signal failure and disastrous consequences, to strengthen and confirm, rather than to penetrate and weaken, that monopoly of the market for the exclusive sale of favorite and enduring stocks which we have described. Many of the stock brokers acquired a habit of considering it *infra dig.* for them to buy and sell anything but Government, Bank, and East India Stock; and not a few of them persevered in excluding all other business during the years 1824 and 1825, which was the epoch when that great inroad was made on the old practice. Many of the companies formed at that period were substantial, useful undertakings, and their shares yet retain possession in the money market in the same manner, according to their relative value, as the shares of Bank Stock.

This short sketch is necessary because men are still apt to be too much biassed by former habit. The Railway system has now completed the breach in the monopoly which, in a popular and general sense, was first made in it by the public companies formed in 1824-25. The establishment of joint-stock banks and the spread, transfer and sale of their shares, kept the war against the monopoly alive, and the large daily sale of Railway shares since 1840 has given full and free possession of the market to all other descriptions of stock, as well as the three which retained almost exclusive possession of it till after the commencement of the present century. . . Nothing can now prevent whatever of a public, beneficial and accruing character that is divided into shares, being for the future sold in the money market as currently as Government securities.[84]

[84] February 26, 1847.

Late in '44, a correspondent prayed *The Times* "to raise its powerful voice in warning about the railway mania, which was spreading like wildfire over the land." Its consequence could only be "a pecuniary crisis" which would shake the country to its foundations.[85] As in earlier periods of rampant speculation and share-jobbing, *The Times* reiterated warnings of disaster throughout the following year. Repeatedly in leading articles it queried: "Whence is to come all the money for the construction of railroads?" In July, it prophesied:

> Soon or late the day will come when an untold proportion of this year's scrip holders will be doubly pressed; no longer able to suffer the sums they have already paid to remain buried in the earthworks of an unfinished line, much less to pay up the quick recurring calls of the company. A very trifling fall of the commercial thermometer will be sufficient to try the value of a hundred millions of promises. A drop from fever-heat to blood-heat will shrink off paupers and pensioners, and nobodies and aliases, and bankers' clerks and aged cornets on half pay, and fifty other ephemerides of the market. A further descent to temperate heat will prove serious to shopkeepers investing in scrip the inadequate capital of their trades, to attorneys playing at pitch-farthing with trust money, and country clergymen sick of the monotonous three percents. Thence to the freezing point is a downfall almost too painful to contemplate; much more zero and under, which it would be positively inhuman to predict, did not recent experience assure us that even the worst must come.[86]

In October, the *Morning Chronicle* declared that there were legitimate reasons for believing in the possibility of a panic; "and if it does occur, like the touch of an infant's finger, it may throw down our house of cards."[87] Finally, in November, when the house of cards was tumbling *The Times* commented as follows on the great railway sweepstakes: "The only safe speculation . . . was to bet indiscriminately against every one of the thousand projected lines . . . Had the *forms* as well as the reality of pure gambling been adopted perhaps the public would have been alive to the affinity of the share market with the turf . . . the

[85] November 20, 1844. In Parliament, Lord Brougham recalled Liverpool's warnings of twenty years earlier, and, urging a halt to the passage of new railway acts, warned his colleagues of inevitable panic in their own day. (Hansard, LXXIX [1845], 226ff.)

[86] July 31, 1845.

[87] October 17, 1845.

infatuation of the public consists in this,—that instead of betting against every railway as a turf speculator would have done, it betted in favour of every railway."[88]

For a time during the boom railway shares had rendered others unfashionable.[89] Nevertheless, promotions in other fields rode in on the tide of railway speculation[90] and continued apace over the decade after it had receded. The following table classifies nearly a thousand of such enterprises which were "completely" registered down to 1856 under the Act of 1844. The number of mining enterprises is to be noted, as is (again) the sharp contrast between cotton and woollen manufacturing; the high proportion of public utilities, and the continued flotation in considerable number of insurance and shipping companies. Banks, it is to be remembered, were not included within the provisions of this Act.

The tragic losses sustained in the collapse[91] and the revelation of Machiavellian financial operations—flagrant breaches of trust in general, and in particular "a constant hocus-pocus between capital and income accounts"[92]—gave rise to a demand for gov-

[88] November 13, 1845; cf. *ibid.* (October 25, 1845).

[89] *Ibid.* (June 11, 1847).

[90] In the words of *The Times* (November 5, 1845), it had "begotten others of an ephemeral character." In comment upon an official return to June 30, 1845, it wrote (leading article, October 31, 1845): "The Registrar must find his office no sinecure. Stationed to catch and note down the bubbles as they rise and soar into mid-air, he must feel almost stifled in the froth of a thousand schemes."

[91] On November 14, 1845 *The Times* estimated that "the shock given to credit within the last three weeks has changed the current value of property in this country to the amount of £30 million." Clifford (*op. cit.*, I, 89) quotes an estimate of the Cardwell Committee (1853) that the shares of 10 leading railways, depreciated in value, 1845–47, some £78 million.

[92] *The Times* (July 14, 1845). Cf. leading article in the *Morning Chronicle* (May 17, 1845): "What are the precise criteria which distinguish revenue from construction charges it is no easy matter to determine, though it is a difficulty which must ere long be definitely solved by the closing of capital accounts. All outgoings from thenceforth must be charged against revenue. At present there is great room for controversy, but this, at least, will be generally agreed to, that the principle adopted by any company in the distribution of its expenditure between the two accounts is of comparatively minor importance, provided that the system pursued be distinctly avowed and understood by the shareholders. It is the deception practised upon unwary proprietors by avowing one rule and clandestinely acting upon another, that has produced so much discredit and disaster." The main point of this remarkable passage has been insisted upon in recent correspondence between the New York Stock Exchange and the American Institute of

ernment audit of railways. The idea was warmly discussed in and out of Parliament.[93] In 1849, railway opposition defeated a bill, introduced following the recommendations of a Parliamentary committee,[94] which would have required public auditors in supplement to those appointed by the companies. *The Economist* stamped the proposal as "interfering and meddling"—rather, let the shareholders appoint some one of the many professional accountants with a reputation staked on correct performance.[95] The same point of view pervaded a remarkable tract of the day (attributed by some to Lord Overstone).[96] A trenchant brief for the employment of auditors having no financial interest in the company, to be appointed by and responsible only to shareholders, and chosen for professional competence, it was also a vigorous castigation of government interference:

Accountants (cf. *Audit of Corporate Accounts*, New York [1934], p. 9): "Within quite wide limits, it is relatively unimportant to the investor what precise rules or conventions are adopted by a corporation in reporting its earnings if he knows what method is being followed and is assured that it is followed from year to year." Cf. also G. O. May, *The Influence of Accounting on the Development of an Economy*, "I. The Nature of Accounting," in *The Journal of Accountancy*, Vol. LXI (January, 1936), p. 12.

[93] Cf. Hansard, CVI (1849), 1243 ff ; *The Times* (July 12; August 25, 1849). In a leading article on the first date that journal argued: "It is certain that not only would a temporary rise in the value of shares be the result of a system of audit in which the public could have confidence, but that this is the only method by which they can ever be made to assume the character of a public investment."

[94] Lord Monteagle, Chairman. Cf. *Report of Select Committee on Audit of Railway Accounts* (*P. P.* [1849], X, xvii). The Report was an able brief for the regularization of railway accounts in matters of both form and content, as well as of audit practice.

[95] VII (1849), 795.

[96] [Daniel Hardcastle, pseud.], *Railway Audit. A Plan for the Audit of Accounts in Railway and Other Joint-Stock Companies*, London (1850). Cf. Memorandum, "Railway Audit," by R. M. Bromley (App. 7, *Third Report, Select Committee on Railway and Canal Bills, P. P.* [1853], XXXVIII). He raised the question "whether a Government audit would not give a character to railway shares for investment equal to the public funds; and, should anything go wrong, whether in the venality of the auditor, or by any other means, the Government might thereby be compromised." The proposal was revived in 1861 by James Hutton. Cf. his *Suggestions as to Appointment by Legislature of Public Accountants to Audit Accounts of All Joint Stock Companies*.

TABLE XI

UNLIMITED COMPANIES COMPLETELY REGISTERED UNDER THE COMPANIES ACT OF 1844[97]
(1844–1856)

	English	Irish
Coal and iron mines	16	.....
Lead, copper, etc. mines	14	7
Quarries	11	.....
Smelting, manufacturing ores	3	.....
Railway rolling stock	7	1
Briquettes and coal by-products	7	2
Bricks, tiles, pottery	10	.....
Shipping, coastal, etc.	41	.....
Shipping, ocean	5	.....
Omnibuses, etc.	7	.....
Telegraphy	1	.....
Cotton manufacturing	13	.....
Woollen manufacturing	1	.....
Miscellaneous industries	18	.....
Breweries	6	.....
Other food and drink	24	1
Houses, land and buildings	29	2
Markets and public halls	85	1
Colonial gas and water	1	.....
Colonial railways	10	.....
Colonial mines and lands	28	.....
Foreign gas and water		4
Foreign railways		2
Foreign mines and lands		29
Petty lending	41	.....
Insurance	219	.....
Gas and water	211	28
Railways	8	2
Other public utilities and works	13	.....
Unclassified	46	1
Totals	910	46
	956	

[97] Shannon, *op. cit.*, p. 420. For an earlier classification, see Levi, *Statistical Journal*, XXXIII (1870), 1–41. Over the period, there were almost 4,000 "provisional" registrations. Allowing, however, for 1600 for railways (of which, accord-

Whenever the fingers are burned, a cure is always lustily called for by those who have been burned the most severely, and their object in this, as in the diversion that has hurt them is always the same—they call for the appointment of a government officer, who shall from time to time regulate how they shall hold their hands to the fire without being burned. Whether this special interference shall be crowned with success by keeping down the heat of the fire, or by increasing the distance at which the venturesome hand shall be allowed to approach it, is a perplexing difficulty which has not yet been solved. When duly considered, that difficulty must be held to be not a little perplexing; for evidently, if the heat of the fire should be kept so low, or the distance from it so great, as that no hands can be burned, why then there will be no fun in the thing, and the government officer will enjoy a sinecure.

. . . . . .

I felt ten years ago the want of a check and regulator—not in the management of our railways only, but in the conduct and operations of our whole joint-stock system. . . . An effective audit of all our railway and joint-stock transactions is absolutely needed; but every man, who is not either weak-witted, a place-hunter, or a used-up gambler, will eschew an audit by government officers. At the time of crisis, and whenever it was worth while, they, too, would be corrupted; and in times of no crisis, they surely become lax and inefficient. We come to see thus that there is no security attainable but by giving the chief power to those whose interests are most at stake—that is, to the shareholders themselves.

By and large—except in the case of some special institutions such as Friendly and Provident Societies—audit has never been committed to governmental hands but left to accountants in private practice.[98]

We pass to the final struggle for the limitation of the liability of shareholders as a matter of general right.

ing to Shannon, 1200 were made before the end of 1845, with some 800 of them in the three months, August to October), the proportion of those failing "to persuade investors" is considerably reduced. Provisional registration with railways was compulsory and made, presumably, in anticipation of statutory sanction; complete registration with them was optional (cf. Shannon, *op. cit.*, p. 397, and Levi, p. 24). According to Levi (*op. cit.*, p. 14), 135 companies were incorporated with limited liability by Act of Parliament, 1844–53.

[98] For further discussion of the development of accounting and the accounting profession, see *infra.*, pp. 140-42.

CHAPTER VI

LIMITED LIABILITY

"The economic historian of the future," recently remarked *The Economist*, "may assign to the nameless inventor of the principle of limited liability, as applied to trading corporations, a place of honor with Watt and Stephenson, and other pioneers of the Industrial Revolution. The genius of these men produced the means by which man's command of natural resources was multiplied many times over; the limited liability company the means by which huge aggregations of capital required to give effect to their discoveries were collected, organized and efficiently administered."[1] Such a statement has now a commonplace ring, but in the fifties the same journal wrote in reference to making limited liability generally available: "Never, perhaps, was a change so vehemently and generally demanded, of which the importance was so much overrated."[2]

The middle of the century marked the high tide of *laissez-faire*,[3] and at its crest this alteration in the law was sought and granted in the name of "perfect freedom"[4] after a struggle that forms one of the most interesting episodes in the history of the joint-stock company in England. "Limitation of responsibility" became the subject of repeated and voluminous legislative inquiry[5] and heated debate, a topic of widespread discussion in commer-

[1] December 18, 1926.

[2] *Ibid.*, XIII (1855), pp. 84–5.

[3] Cf. E. F. Gay, *Proceedings, Academy of Political Science*, Vol. XI (1926), p. 555.

[4] *Economist, loc. cit.*; cf. *ibid.*, p. 925, and *The Times* (June 1, 1855).

[5] See *Report of S. C. on Investments for the Savings of the Middle and Working Classes*, 1850 (XIX *P. P.*, #508), cited below as *Report of 1850; Report of S. C. on the Law of Partnership*, 1851 (XVII *P. P.*, #509); *First Report, Royal Mercantile Law Commission*, 1854 (XXVII P. P., #1791).

cial circles,[6] an object of professional investigation,[7] and the solicitous concern of the social reformer.[8] Reinforced by the pressure of rapidly accumulating capital,[9] more and more widely diffused and seeking investment, dogged persistence in Parliament combined with the spirit of the age to secure full liberty of incorporation. Liability of the shareholder to the extent of his last shilling and last acre, in Eldon's phrase, was finally swept away. England thus, in contemporary words, took "the crowning step in removing the fetters from human industry, by removing from her code the last of those enactments which [could] impede a free development of her industrial resources."[10]

Paradoxically, individualism was forced to give way to *laissez-faire*. The argument from the former premise inheres in McCulloch—"In the scheme laid down by Providence for the government of the world," he wrote with due specific gravity, "there is no shifting or narrowing of responsibilities, every man being personally answerable for all his actions. But the advocates of limited responsibility proclaim in their superior wisdom that the scheme of Providence may be advantageously modified, and that debts and obligations may be contracted which the debtors though they have the means, shall not be bound to discharge."[11] Or, one may quote also in illustration of this point of view the words of a Manchester manufacturer. If liability were limited,

failure of success would be shielded from reproach; the law would become the refuge of the trading skulk; and, as a mask cover the degradation and moral

[6] *E.g.*, cf. a memorandum of the Committee of Merchants and Traders for the Amendment of the Law of Debtor and Creditor, London (*Report of 1854*, App., pp. 191–3). The Liverpool Chamber of Commerce held a debate on limited partnership which extended over three days (cf. *The Times*, April 3, 1854). Cf. the *Morning Chronicle* (January 5, 1852).

[7] Cf. discussion of "Report of the Committee of the Law Society for Amendment of the Law" in *The Law Review* (May, 1849) and *Report on the Law of Partnership* (1855) published under the auspices of the Society.

[8] Cf. *Edinburgh Review*, XCV (1852), 405–53, and *Westminster Review*, LX (1853), 375–416; LXV (1856), 34–51; and *infra*.

[9] It was increasing at the rate of £40 million a year, according to the estimate of G. R. Rickards (Professor of Political Economy, Oxford). Cf. *Report of 1854*, App., p. 231.

[10] G. W. Norman (a director of the Bank of England), *ibid.*, p. 170.

[11] Art., "Partnerships, Limited and Unlimited Liability," *Encylopaedia Britannica*, 8th ed. (1859), XVII, 321.

guilt of having recklessly gambled with the interests of traders; and then the stain which now attaches to bankruptcy would cease to exist . . . The position of our mercantile character is a treasured object, and demands the best security we can obtain for the upholding of it. On that account we cannot hesitate to prefer the security of a man who without reservation, offers to stake his whole property and the treasured estimate of his own respectability upon the result . . . as against the pretensions of another who requires to be fenced in by conditions.[12]

But, as Robert Lowe declared to the Royal Commission on Mercantile Law:

The sum of the reasoning [by which] the present law is sought to be justified, is that *he who feels the benefit, should also feel the burden.* This is true enough as a principle of natural justice, and in the absence of contract; but there is a maxim equally true that anyone can renounce a right introduced for his benefit, and if people are willing to contract on terms of relieving the party embarking his capital from loss beyond a certain amount, there is nothing in natural justice to prevent it. . . . The received principle in commercial legislation is to leave people to act for themselves.[13]

Or, in the language of a director of the Bank of England:

The permission to all men, to employ their capital and industry in that manner which they think most suitable to their own interest, unshackled by hostile enactments on the part of the legislature, is found on the whole to be most conducive to the general prosperity. It is the principle upon which the doctrine of free trade is based—upon which the strict law of apprenticeship has been abolished, the guilds and licensed companies of former times have gradually disappeared, and been replaced by a state of things based on open competition.[14]

In the House of Commons, Robert Slaney, who had long been known as a staunch champion of economic reform and especially for his "benevolent exertions to ameliorate the condition of the poor,"[15] became the indomitable protagonist of limited liability. His first approach was advocacy of the partnership *en commandite.* In 1850, he was successful in obtaining the appointment of a Parliamentary committee on investments for the savings of the middle and working classes.

[12] Henry Ashworth, *Report of 1854,* App., pp. 195–6. Cf. James Clark, merchant of Glasgow: " 'Owe no man anything' is a sound principle of morals . . . and the law ought not to facilitate a deviation from it." (*Ibid.*, p. 105).

[13] *Ibid.*, p. 84 (italics in original).

[14] G. W. Norman, *ibid.*, 168.

[15] Cf. *Dictionary of National Biography,* XVIII, 367.

During the half-century just elapsed, a number of agencies had arisen to encourage, as well as to guide into safe channels, the swelling stream of small savings. One by one, they had been recognized and brought under the wing of legislative protection or regulation. There were the savings banks,[16] the friendly societies,[17] and the benefit building associations.[18] Further, life insurance policies were rapidly being extended to small risks[19] and deferred annuities (through savings banks) had received legal sanction.[20]

The movement, to be sure, had not been without occasional phases of disillusionment—the late forties brought to light a series of harrowing frauds among the savings banks[21] in particular, which "threatened a check, financially and morally, to the future provident habits of the labouring classes," but on the other hand, went to prove: "that large and difficult questions, legal and economical, are mixed up with a matter apparently so simple as the accumulation and deposit of odd pence and shillings."[22]

In 1850, therefore, "investment for savings"[23] was a moot problem. To provide and point out safe and profitable investments for "the frugal and industrious of the humbler classes,

[16] The number of depositors had increased, from 1830 to 1850, from 412,217 to 1,092,581; deposits from £13.5 to over £27. million. Cf. *Edinburgh Review*, XCV (1852), 407.

[17] There were in 1849, 10,433 enrolled Friendly Societies, numbering some 1,600,000 members, having an annual revenue of £2,800,000, and an accumulated capital fund of £6,400,000. Including unenrolled societies, the totals were: 33,223 societies; 3,052,000 members; annual subscribed revenue, £4,980,000; capital funds, £11,360,000. "The whole adult male population of the United Kingdom may be taken at about 7,000,000: nearly half of these, therefore, without distinction of rich or poor, are actually members of some of these societies" (*ibid.*, *loc. cit.*).

[18] Before 1851, there had been registered over 2000, of which there existed in 1850 about 1200, with an annual income of £2,400,000. Cf. Scratchley, *Industrial Investments and Emigration*, 2nd ed., (1851).

[19] One mutual company, the Temperance and General Provident, effected more policies in a year than any two of the great standard offices. Cf. *Edinburgh Review*, *op. cit.*, pp. 415–6.

[20] By 3/4 Wm. IV, c. 14.

[21] Scratchley, *On Savings Banks*, London (1860), Chapter III, *passim*.

[22] *Ibid.*, p. xxvi.

[23] Cf. *The Economist*, VIII (1850), 537. The annual amount of savings invested by "the poorer part of the community" was estimated at little short of £3 million (*ibid.*, p. 479).

wrote an Edinburgh reviewer, "combines all the requisites and avoids nearly all the prohibitions which mark out the legitimate path of philanthropic aid. It interferes with no individual action: it saps no individual self-reliance."[24]

The existing avenues for placing funds were considered inadequate as well as unsatisfactory. "The deficiency complained of," declared the Professor of Political Economy at Oxford, was "not that of capital, but of investments for capital." No greater perplexity confronted the industrious classes. Perpetual difficulty was being experienced "in disposing of money."[25] For one thing, the public debt was diminishing. Moreover, larger portions of it were being tied up annually in the hands of trustees.[26] And, in any event, men were dissatisfied with what Lord Stowell had once termed "the sublime simplicity of three-percents."[27] Many obstacles confronted the purchaser of land, especially in small amounts. The law of partnership was obstructing "the way of any body of workmen who desired to combine their money and labor in industrial undertakings."[28] The narrowness of the "privileged" Acts—those for the constitution of Friendly Societies, and the like—forced abandonment on the one hand, or left only the dangerous alternative of forming a joint-stock company with unlimited liability. Inasmuch as only three classes of persons would engage as shareholders,—"*fools*, who think they can lose nothing; *rogues*, who know they having nothing to lose; and, *gamblers*, who will stake everything upon the cast of a die,"[29] —many local projects of improvement were held up:[30] waterworks, lodging houses for workmen, baths and wash-houses.

The argument for limitation of liability thus had acquired a clear tinge of social amelioration: "To have saved money and

[24] *Op. cit.*, p. 406.

[25] *Report of 1854*, App., p. 230.

[26] *Ibid.*, p. 83. The difficulties would increase, it was suggested, as railway enterprise diminished (*ibid.*). Indeed, this avenue was "almost exhausted"! (Hansard, CXIX [1852], 669).

[27] Cf. H. L. Morgan, *Personal Liabilities of Directors of Joint Stock Companies*, 4th ed. (1859), p. 21.

[28] *Report of 1850*, p. iv.

[29] *Ibid.*, Evidence, Q. 29.

[30] *Report of 1850, loc. cit.*

invested it securely, is to become a capitalist; is to have stepped out of the category of the *proletaires*; and to have deserted the wide and desolate multitude of those who *have not* for the more safe and reputable companionship of those who have. [However,] while it was not for the Legislature to contrive that the guinea of the rich man and the penny of the poor man shall yield an equal revenue, [the Legislature should] diligently see to it that by no act, connivance or negligence of theirs, shall this desirable result be hindered."[31] The cry of a member of the Nottingham Coöperative in 1840, "Who can deny the right of the working man to form joint-stock companies to increase their wealth by the profits of their own consumption?"[32] found an echo in John Lalor's *Money and Morals*, in 1852. The joint-stock principle would prove "an instrument of immense latent capacity for elevating the whole laboring class." It was "their clear and undoubted *right* to have use of this instrument, and those who withhold it from them do so at their peril."[33]

Conspicuous among the witnesses before the Committee of 1850, was John Stuart Mill. The limited partnership had become a strand in his central theme of coöperation, an implement to effect social betterment. "There is no way," he declared, "in which the working classes can make so beneficial a use of their savings both to themselves and to society, as by the formation of associations to carry on the business with which they are acquainted."[34] The most important obstacle which the laws of partnership placed athwart the improvement of the working classes was, in his view, that thrown in the way of "combinations of workmen for the purpose of carrying on production coöperatively."[35] With characteristic insight, he added: "The great

[31] *Edinburgh Review*, XCV (1852), 408.

[32] *Address to the Working Classes* (by a member of the Nottingham Coöperative Store), Nottingham (1840).

[33] *Money & Morals: a Book for the Times* (1852), Ch. VII, "Working Partnerships," pp. 203–4.

[34] *Report of 1850*, Evidence, Q. 852.

[35] *Ibid.*, Q. 837. Though not rivaling the proportions of the current French movement, there were in London at the time eight of such undertakings. They were composed of tailors, needle-women, printers, pianoforte makers, builders, shoemakers and bankers. Cf. *Edinburgh Review, loc. cit.*

value of limitation of responsibility as related to the working classes would not be so much to facilitate the investment of their savings, not so much to enable the poor to lend to the rich, as to enable the rich to lend to the poor."[36]

The opinions of some others invite brief mention. McCulloch, who had a strong distaste for anything in the nature of humanitarian twaddle, argued that the condition of the working classes would never be improved "by withdrawing their attention from the businesses to which they have been bred . . . to fix it upon joint stock adventures," and so distract their attention from sober industry. Savings banks afforded the most beneficial investment for their savings.[37] A reviewer in the *Edinburgh*, on the other hand, thought the experiment worth trial—although such projects might have failure written on their face, it was "the birthright of Britons to play at ducks and drakes with their money," a privilege as dear to the poor as to the rich.[38] From another point of view, *The Economist* held that "a manufacturing enterprise in which all head workmen should be partners *en commandite* . . . their own interests bound up with the success of the undertaking . . . would find itself possessed of quite a new element of prosperity. . . . It would help eradicate hostile feeling between capital and labor."[39]

In reporting, the Committee argued that the great change in the social position of multitudes consequent upon the growth of large towns and crowded districts rendered it necessary that corresponding changes should be made in the law "both to improve their condition and contentment, and to give additional facilities to investments of capital" which their industry was constantly creating. In particular, it was urged that charters should be

[36] *Report of 1850*, Evidence, Q. 847.

[37] *Op. cit.*, p. 322.

[38] *Op. cit.*, p. 439.

[39] *Loc. cit.* John Watt in *The Facts of the Cotton Famine* (1866), p. 341, speaks of 44 "spinning and manufacturing joint-stock companies in which the shares were largely held by working men." Nearly all had originated since 1859. "The most favored and famous" was "The Bacup and Wordle." Some of them, he thought, would doubtless weather the difficulties then current.

available at far more reasonable cost in the future (one for a workman's housing project had cost upwards of £1000).[40]

The Board of Trade had in fact continued ultra-conservative in extending corporate incidents by charter.[41] As a former member told the Committee, the rule had "decidedly been to refuse rather than to grant charters from an unwillingness to encourage improper speculation," and also in view of "a very great jealousy" on the part of traders who feared that the competition from concerns thus privileged would not be fair.[42] The discretionary power of the Board was now assailed in various quarters. The *Westminster Review* likened this "regal dispensation from the rigors of the common law" to James I's prerogative of granting monopolies—"fundamentally vicious in principle."[43] Robert Lowe declared that he would "as soon think of allowing the Secretary of the Treasury to grant dispensations for smuggling or the Attorney-General licenses to commit murder."[44] E. W. Fields complained of *leges non scriptae*, and deplored "this state nursing of corporate partnerships" as "fearfully expensive and tedious." The American and Canadian system of granting charters to all applicants as of public right should be emulated.[45] There should not be bureaucratic discretion, argued the *Circular to Bankers*, inasmuch as "the liberty to associate for purposes of trade is undoubtedly a fundamental principle in the civil rights of nations."[46] However, Edward Cardwell, President of the Board, advised his colleagues in the Cabinet in 1853 that in his judgment, despite the clamor out-of-doors, the law should be maintained as it stood "in spirit and in practice." Unlimited liability was founded on "natural justice" and every authority

[40] *Report of 1850*, pp. iii–iv.

[41] Of some 160 applications for charters with limited liability, 1837–1855, the Board had granted under 100 according to Levi (*op. cit.*, p. 14).

[42] *Report of 1850*, Evidence, Q. 521.

[43] Vol. LX (1853), p. 409; cf. Edw. Warner, M. P., *The Impolicy of the Partnership Law* (1854), p. 30.

[44] *Report of 1854*, Evidence, p. 87.

[45] *Observations of a Solicitor on Limited Liability and on Commercial Charters* (1854), p. 70 ff.

[46] February 3, 1855.

from Lord Mansfield to the day could be cited in support.[47]

The *Report of 1850* fell upon deaf ears, however, and in the following session Slaney moved for a committee on the law of partnership. He now argued for "the enfranchisement of capital"—the restrictions in force prevented the "united investment of small amounts"—the working classes were not partakers of the general improvement—limited partnership was supported by "the ablest of men, the deepest thinkers, the kindest philosophers."[48]

The Committee of 1851 reiterated the views of its predecessor: restraints should be removed which prevented those of moderate means from "taking shares in investments with their richer neighbours, as thereby their self-respect is upheld, their industry and intelligence encouraged, and an additional motive given to preserve order and respect for the laws of property."[49] The *Law Review*[50] had recently expressed a similar view—the partnership *en commandite* was peculiarly necessary to meet "a desire for socialism and communism" which would become "overwhelming unless means be taken to allow of fit arrangements of an intermediate character." Before the Committee, it was urged that limited partnership would allow of bringing the interest of the working man into closer identity with that of the capitalist and a chance for advancement earlier in life: "not every Watt has found his Bolton."[51] Indeed, Babbage held that the prevailing law presented greater obstacles to the advance of the mechanical arts, than even the defective state of the patent law; it was "highly unfavourable to inventors."[52] The *Report on the Law of Partnership* again suggested greater facility in the matter of charters; recommended that there should be a legal mode of

[47] "Confidential Memorandum on Limited Liability" to the Cabinet, January 14, 1853 (*Gladstone Papers*).

[48] Hansard, CXIV, 842 ff.

[49] *Report of 1851*, p. vi.

[50] Vol. XVII (1848–9), p. 74; cf. *Westminster Review*, LX (1853), 415.

[51] T. Howell, warehouseman of London, *Report of 1851*, Evidence, Q. 156.

[52] Memorandum to the Committee, *Report of 1851*, p. 161; cf. *Circular to Bankers* (November 7, 1851). Nearly twenty years earlier, he had suggested (*Economy of Manufactures*, p. 361), that limited responsibility was "calculated to aid division of labor."

borrowing capital without risk to the lender beyond the amount advanced;[53] and, in general, argued for relaxation of restraints without, of course (as always),[54] giving encouragement to ignorant or reckless speculation.[55] Finally, the Committee recommended, in the contemptuous words of the *Morning Chronicle*,[56] "that old-established refuge of incapacity—the appointment of a commission" to suggest necessary measures.

Returning to the attack in 1852, Slaney moved for a Royal Commission.[57] Joining forces, Richard Cobden (also a member of the Committee of 1851) declared that he could see no reason why England should be an exception to the rest of the world[58]—it was only justice to give the same privileges to small as were enjoyed by large undertakings—"the working classes should have the fullest opportunity of trying experiments for themselves;"[59] the law, as it stood, prevented "the marriage of skill and capital by means of limited liability."[60]

The Commission was duly constituted. As the result of something like a straw vote conducted at home and abroad on the various questions at issue,[61] the members were "much embarrassed by the great contrariety of opinion . . . men of great experience and talent had arrived at conclusions diametrically opposite." On which side the weight of authority in England was

[53] Cf. Mill's trenchant memorandum, *Report of 1851*, App., p. 160: "No one can consistently condemn these partnerships without being prepared to maintain that it is desirable that no one should carry on business with borrowed capital. In other words, that the profits of business should be wholly monopolized by those who have had time to accumulate, or the good fortune to inherit capital, a proposition, in the present state of commerce and industry, evidently absurd."

[54] Cf. *infra*.

[55] *Report of 1851*, p. ix.

[56] November 4, 1851.

[57] Hansard, CXIX, 668.

[58] After reprinting the business corporation law of the State of Iowa passed in 1851, the *Circular to Bankers* (February 21, 1852) commented: "The present law of partnership is so great an obstacle to the security of [new] investments that if the Government do not open some new course, it is highly probable that the capital now so abundant in this country will be transferred to foreign parts."

[59] Hansard, *loc. cit.*, 679.

[60] *Ibid.*, 682; cf. *Circular to Bankers* (November 7, 1851).

[61] See *Report of 1854*, Appendix, pp. 53–291, for memoranda and answers *seriatim*, submitted to the Commission's questionnaire.

preponderant, it was difficult to say; in contrast, foreign opinions were in great majority favorable. Nevertheless, the Commissioners considered it "inexpedient to allow all persons to trade at their own election with limited liability; such alteration of the law would not operate beneficially on the general trading interests." With regard to the proposal to allow loans to a partnership at a rate of interest varying with profits, they were not agreed. In sum, "the annually increasing wealth of the country, and the difficulties of finding investments for it were sufficient guarantees that an adequate amount will always be devoted to any mercantile enterprize that holds out a reasonable prospect of gain without any forced action upon capital to determine it in that direction; any such forced action would have a great tendency to induce speculative adventures" to a dangerous extent.[62] This point of view was, to many, fundamental;[63] from the array of conflicting arguments, it may be singled out for consideration first.

There was a firm and widespread conviction that unlimited liability was not only some safeguard against speculation[64] (the memory of the railway mania of the forties was still very much alive),[65] but also that general limitation, by allowing men "to indulge their spirit of adventure without endangering their fortunes"[66] would produce "a sudden convulsion, a rush into all sorts of schemes" [67]—"plausibility would be raised to a premium, and caution would stand at a discount."[68] According to Lord Overstone, "any relaxation of the sense of responsibility must of

[62] *Report of 1854*, pp. 5–8.

[63] Cf. Hansard, CXXXIX, 1385 f.; 1915.

[64] Cf. Wm. Hawes, *Observations on Unlimited and Limited Liability* (1854), pp. 5, 16; and Geo. Sweet, *Limited Liability* (1855), pp. 15 f.

[65] Cf. *Report of 1854*, App., p. 105; James Clark, a Glasgow merchant, informed the Commission that with regard to limited liability, he would "make *no exception whatever*, not even railway companies. If the railway system is the triumph of limited responsibility, I must insist upon the production of an account current of its transactions with the nation, and upon debiting it with the crisis of 1847–8, with the Protean perfidy and shameless chicanery which it has naturalized among us." (Italics in original.)

[66] Lord Curriehill, *ibid.*, p. 18.

[67] Cf. *The Economist*, XII (1854), 195.

[68] *Report of 1854*, App., p. 195.

necessity tend to cause a diminution of the caution with which concerns are undertaken, of the anxious vigilance with which they are conducted, and the resolute effort with which difficulties are encountered and overcome. In these considerations consist the real safeguards to society; without which we should be exposed, far more than at present, to the evils of inconsiderate enterprise and reckless speculation."[69] "Were Parliament to set about devising means for the encouragement of speculation, overtrading and swindling," wrote McCulloch, "what better could it do?"[70] On the other hand, Norman characterized all such opponents as being "terrified by a set of phantoms, the creatures of their own imaginations."[71] And Bramwell, one of the dissenting Commissioners, considered the prophecy of mischief discredited by the experience of other countries.[72] The supposed tendency of limited partnerships to stimulate undue credit was a charge, J. S. Mill declared, which might far more truly be brought against the principle of unlimited liability.[73] The *Circular to Bankers* observed that the law of partnership had not in fact deterred from speculation either the penniless adventurer or the skillful promoter of bubble schemes.[74] Fear of speculation invoked "the paternal theory," declared another commentator: "Do not let men walk the streets, lest they should be run over."[75] In the same vein, the *Westminster Review* argued:[76]

> Under these objections lurks the . . . spirit which once regulated the wages of labour and the quality of manufactures, which afterward 'protected' native industry, and which still fixes the price of bread in Paris; the old school of political economy which David Hume and Adam Smith were among the first to assail . . . was ridiculous and mischievous enough,

[69] *Ibid.*, p. 93.
[70] *Encyclopaedia Britannica, op. cit.*, p. 321; cf. his *Considerations on Partnership with Limited Liability* (1856), p. 6.
[71] *Report of 1854*, App., p. 169.
[72] *Ibid.*, p. 24 f.
[73] *Ibid.*, p. 237.
[74] November 7, 1851.
[75] E. W. Fields, *Observations of a Solicitor on Limited Liability and on Commercial Charters* (1854), p. 90.
[76] Vol. LX (1853), pp. 397–9.

with its encouragement of some trades, and its prohibitions and restrictions of others but those who would devise or perpetuate schemes for inducing a general resort to one kind of investment which they think safe, and for throwing obstacles in the way of embarking capital in other enterprises which appear rash or reckless, carry the doctrine to a much more preposterous length. The protectionists could at least plead a foolish belief that the welfare of the State was promoted by their interference: but the only excuse [in the present case is] a very injudicious interest in their neighbours' affairs. Government has neither the mission nor the power to guide its subjects to good, or to drive them from bad investments. If, as is now universally admitted, it does not fall within its province to direct industry and capital, in the interest of the state, into any particular channel, how much more remote from its duties is it to encourage or discourage this or that employment of capital from regard to the interests of individuals? If cabinet ministers and legislators were to undertake such a task, how, it may be asked, would they set about accomplishing it? How would they distinguish, *a priori*, a good from a bad investment?

Closely related and also a chief point of controversy, was the effect of limitation of liability upon the position of the creditor. On the one hand, it was suggested that existing law in its solicitude for the security of the creditor overlooked evils which it "inflicted upon society in general."[77] After the Act which was eventually passed, McCulloch complained that their rights had been sacrificed without compensation or equivalence of any sort.[78] Before the Royal Commissioners, it was now argued that creditors would be exposed to the risk of fraud: "limited partnerships obtaining funds from them . . . without their being made aware of some of the partners—probably the only ones of substance—having acquired such an immunity from their legal liability . . . It would often happen that at the time when funds are acquired by such a company on credit, the in-put capital which it is proposed to substitute for the joint liability of the partners would have previously ceased to exist . . . Such would be the case even if the capital had disappeared by innocent misfortunes . . . But experience has shown it very easy by collusion among the partners to begin business without the stipulated capital being *bona fide* paid in; and still more easy to withdraw

[77] Cf. *Circular to Bankers* (November 7, 1851).
[78] *Op. cit.*, p. 317.

it in the name of profits or under other disguises."[79] In the view of the contemporary Governor of the Bank of England, J. G. Hubbard, the creditor must be satisfied, whatever the consequence to the shareholder; it could not for a moment be doubted that "where unlimited power of borrowing exists, unlimited liability should attach."[80]

On the other hand, the opinion of Thomas Hankey, a Director and also a former Governor, was in direct contradiction. He had not found in his experience that when a business failed, the capital supposed to have belonged to the several partners had been of any substantial benefit in dividends to creditors. Indeed, the advantages arising from the rule of unlimited responsibility had been greatly overrated.[81] The Deputy Governor, T. N. Weguelin, held that "the present system not only was no impediment to, but actually connived at the most gigantic abuses of credit.[82] A law of limited liability would have a tendency to substitute in business concerns, responsible capital in place of credit. It is clear that the credit of a partnership of limited liability will be limited also, and will be governed by the security afforded by the known capital, and not by a vague estimate of property supposed to exist independently of the business, which in nine cases out of ten has no existence at all, or only a delusive existence."[83] And, as a dissenting member of the Commission itself put it, far from "such a change encouraging and increasing the abuse of credits, its tendency would be rather the reverse—credit would be conceded only on a more stringent investigation."[84]

Hoary ideas of partnership continued to confuse thinking with regard to corporate enterprise. Partnership law, hammered out

[79] Lord Curriehill, *Report of 1854*, App., pp. 15–17.

[80] *Report of 1854*, App., p. 121.

[81] *Ibid.*, p. 101.

[82] Cf. *Report of 1851*, Evidence, Q. 156: "Our system did not prevent twenty houses of rank, pet specimens of the anti-*commandite* principle, from failing in one month [September, 1847] . . . Great destruction of property has followed from this reckless system of raising money upon the shareholders' credit and unlimited liability, money having been expended in speculations which would never have existed had it not been for such facility." (*Ibid.*, Q. 920).

[83] *Report of 1854*, App., pp. 123–4.

[84] Kirkman Hodgson, *ibid.*, pp. 35–8.

of common experience by the Courts and riveted to the legal mind by a long line of decisions, was a barrier to a clear view of the essential change which had taken place in the position of the investor. The typical shareholder was in fact becoming a mere purchaser of income. He was no longer an entrepreneur in the full sense of the word. "Why should the law be so harsh against contributors, and so tender to creditors?" pertinently inquired the Commissioner in Bankruptcy before the Committee of 1851.[85] In 1775, Justice Blackstone had declared: "The true criterion when money is advanced to a trade is to consider whether the profit or premium is certain and defined; or, casual, indefinite and depending on the accidents of trade.[86] In the former, it is a loan; in the latter, a partnership." The same rule applied where a share of the profits was given for services rendered. For example, a clerk or a manager, who stipulated for a proportion of the profits as recompense for services, became a partner in questions with third parties.[87] But here "the law was staggered by its own conclusions" [88] and it was held, by a distinction which Lord Eldon spoke of as "extremely thin" [89] that a salary subject to fluctuation according to the profits of the master's business did not make a partner.[90] However, the rule did not bend in the case of loans. A rate of interest fluctuating with the profits made and a share of those profits had the same effect. Thus an annuity to a retiring partner who left his capital in the partnership, or to his widow, liable to fluctuate with the profits of the business, rendered the annuitant responsible as a partner.[91] The ground for the defense of this rule was found in the case of *Waugh* v. *Carver*, decided in 1793,[92] where it was held that if a person receives part of the profits, "he takes from the creditors part of that fund which is the proper security for their debts." "Is it

[85] *Report of 1851*, Evidence, Q. 525 (R. C. Fane).
[86] *Grace* v. *Smith*, 2 Wm. Blackstone 1000.
[87] *Hesketh* v. *Blanchard*, 4 East 144.
[88] *Report of 1851*, *loc. cit.*
[89] *Ex parte Hamper*, 17 Vesey 404.
[90] *Ex parte Pease*, 19 Vesey 46.
[91] *Ex parte Wilson*, 1 Buck 48.
[92] 2 Wm. Blackstone 23.

reasonable to fasten this extravagant liability on those willing to aid industry by advances of capital?" asked the Commissioner in Bankruptcy.[93]

A discerning few recognized the implications of the shareholder's situation. It was but "natural justice" to Lord Hobart, that a partner with an *active* share in the management of a business should be held liable for the firm's engagements. But, he observed further, the ordinary member or shareholder had no part whatever in management. In making him fully liable, the law was in error, unjust.[94] Shares in joint-stock companies, it was pointed out to the Commission of 1854, were being increasingly used for trust fund investment. In view of how little actual control such partners had in management, it was "only fair to secure them from any further loss than the sum actually invested."[95] *The Economist* seems to have envisaged the facts clearly in so far as banking companies were concerned: "It may be said that if men are liable to the whole extent of their property, the sense of responsibility must induce to greater prudence and caution. This is not to the point, inasmuch as the shareholders who might be so influenced have practically little or no share in the management."[96] And a barrister suggested with a touch of realism that: "All practical experience teaches, that with these companies the fewer powers given to the shareholders—except in cases of gross delinquency—the better; that they must be aristocratic, oligarchic to a high degree, in order to succeed. The proprietary of an unlimited company must in reality be treated like the 'horse and mule' of commercial enterprise—creatures void of 'understanding,' which must be 'held with bit and bridle lest they fall upon thee.' "[97]

The long standing prejudice against the company as a form of business organization, the preference towards "individual" enter-

[93] *Report of 1851, loc. cit.* Cf. *Report of 1854*, App., pp. 30–1; 221–2.
[94] *Remarks on the Law of Partnership Liability* (1853), *passim.*
[95] *Report of 1854*, App., p. 76.
[96] Vol. XVI (1858), p. 167.
[97] *Report of 1854*, App., p. 145.

prise, crops out again in this decade.[98] In the view of one eminent solicitor, all corporations for trading purposes should be prohibited. They were not only injurious to ordinary traders, tending "to introduce competition on an exaggerated scale;" but also, injurious to the parties interested, for no trade could be "carried on by paid managers as by the parties themselves."[99] The first argument was characterized by *The Economist* as "that of the hand-loom weavers to the use of machinery;"[100] to the second objection, the necessity which had arisen for carrying on the business of society by means of "numerous partnerships" would speedily put an end.[101] McCulloch still quoted and applied Adam Smith. Joint-stock organization was applicable only to undertakings which would "admit of being carried on according to a regular systematic plan . . . Companies were in all respects unsuited for the prosecution of ordinary industrial pursuits, whether belonging to agriculture, manufactures or commerce. [None had ever succeeded] without some special privilege. . . . To buy in one market; to sell with profit in another; to watch over the perpetually occurring variations in the prices, and in the supply and demand of commodities; to suit with dexterity and judgment the quantity and quality of goods to the wants of each market; and to conduct each operation in the best and cheapest manner, requires a degree of unremitting vigilance and attention which it would be visionary to expect from the directors or servants of a joint stock association."[102]

Upon the adverse report of the Commission, the question was immediately taken to the floor of the House, although the Cri-

[98] *E.g.*, cf. Hansard, CXXXIX, 1379 f. and *Report of 1851*, Evidence, Q. 525: "A washing company can never supersede washerwomen. Washerwomen will always undersell them."

[99] James Freshfield, *Report of 1854*, App., pp. 67–8. In 1852, the application of the North American Screw Company for a charter was resisted in Parliament as "a direct interference with private enterprise," as likely to establish monopoly. Cunard's alone had several vessels of this description on the stocks and sought no "exclusive privileges," *i.e.*, limited liability (Hansard, CXXIII, 1071–3; 1077–83). For another instance of identification of "company" with "monopoly" at this late date, cf. *Report of 1854*, Evidence, p. 86.

[100] Vol. XII (1854), 699.

[101] *Ibid.*

[102] *Op. cit.*, p. 318. Cf. *Commercial Dictionary* (1855), p. 146.

mean War was at its height. Collier moved that a bill be brought in to remedy the law of partnership; but for its violation, "we should still have travelled in stage coaches and voyaged in sailing packets."[103] The Commission had shown "a total disregard for the first principles of political economy."[104] Viscount Goderich seconded the motion as being consistent with "the whole course of recent commercial legislation." A double system of monopoly yet existed: that enjoyed by the great capitalists,[105] who were alone able to enter trading companies: the power of the Board of Trade to grant charters at discretion.[106] Cobden likened the proposal "to the repeal of the Navigation Laws and the case of the Corn Laws." Accumulation of great masses of capital in a few hands was one of the social blots on the country which alteration of the law would tend to remove, and thus, help "to bridge the gulf which now divided different classes."[107] *The Times*, reversing its historic position on limited liability, inquired: "Who are they in a Christian community who insist that the law between debtor and creditor shall always be of this murderous character . . . that there shall be not only forfeiture of the sum expressed in the bond, but of everything else the debtor has in the world?" [108]

It was stated in the House of Lords that no journal in the country except the *Leeds Mercury* would admit an article against limited liability.[109] The resolution, thus backed by strong public opinion, was carried counter to the opposition of the Government of the day. In the following session, a bill extending the privilege of full incorporation to companies of twenty-five or more members (except in insurance and banking) [110] was passed,[111] but

[103] Hansard, CXXXIV, 755.

[104] *Ibid.*, p. 758.

[105] "The great Sebastopol of the Money Monopoly" in the words of the *Circular to Bankers* (July 28, 1855). Cf. *Westminster Review*, LXV (1856), 36 and *The Times* (July 27, 1855).

[106] Hansard, CXXXIV, 760

[107] *Ibid.*, 784 f. *The Times* (August 17, 1855) remarked: "Limited liability may fairly be considered the Corn Law of the capitalist."

[108] July 28, 1855.

[109] Hansard, CXXXIII, 1896.

[110] Cf. *infra*.

[111] 18/19 Vict. c. 133.

only after renewed resistance. Palmerston expressed surprise that "the strenuous and successful advocates of the principles of free trade should now turn around and try to defeat this bill." This contest lay between the few and the many; it was "a question of free trade against monopoly."[112]

The Act of 1855 was shortly repealed, but was substantially reënacted the next year.[113] Robert Lowe, who had been for several years an ardent advocate of full freedom of incorporation and was now President of the Board of Trade, sounded the tocsin of *laissez-faire* in his very able statement of the case for the measure and of its *modus operandi:*

> The principle of freedom of contract and the right of unlimited association [were at stake]. I am arguing in favor of human liberty—that people may be permitted to deal how and with whom they choose, without the officious interference of the State . . . not to throw the slightest obstacle in the way of limited companies, the effect of which would be to arrest ninety-nine good schemes in order that the bad hundredth might be prevented . . . We should profit by the lessons of the science of political economy: to interfere with and abridge men's liberty, to undertake to do for them what they can do for themselves . . . is helping the fraudulent to mislead them . . . The only way that the Legislature should interfere is by giving the greatest publicity to the affairs of such companies, that every one may know on what grounds he is dealing.[114]

Accordingly, there were few formalities involved in incorporation under the Act of 1856. All of the privileges were available to any seven persons [115] upon registration of the memorandum and articles of association according to the procedure established in 1844.[116] "Limited" attached to a concern's name was required as notice of its status.[117] Earlier safeguards such as registration

[112] Hansard, CXXXIX, 1378. A bill to amend the law of ordinary partnership fell by the wayside. In fact, capital loans to a partnership continued to involve full liability until an amendment in 1865.

[113] 19/20 Vict. c. 47.

[114] Hansard, CXL, 110–38, *passim.*

[115] The maximum permissible membership of ordinary partnerships was reduced to twenty, thus making limited liability in some cases obligatory.

[116] *Supra*, pp. 96-7.

[117] "Impediments" such as the requirement of an annual return of names of shareholders led *The Economist* to say: "We shall be surprised if any encouragement to the formation of companies be really given by the Act." (Vol. XIV [1856], p. 700.) Cf. a discussion of the Act of 1855 in the *Westminster Review* (Vol. LXV

of prospectuses and minimum paid-up capital were discarded. The Act included a model set of articles (by-laws, in American parlance) to be adopted by companies for their governance unless they preferred to substitute their own. The articles were based upon "ordinary rules adopted in joint-stock companies" and the provisions of the Companies Clauses Act of 1845.[118] It was provided that shareholders might apply to the Board of Trade to have the affairs of their concern officially inspected (at their own expense).[119] "Having given them a pattern," Lowe declared in Parliament, "the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution." [120]

This view of the corporation as a representative democracy may and probably does square with the facts of the small company which is in effect but an incorporated partnership. However, in passing and in view of the recent discovery of the large corporation in the United States [121] and of some recent discussion,[122] it is of interest to note that such a mental picture exercised no fascination over the shrewd mind of Herbert Spencer. Even at a time when the ownership of securities was far less diffused than it is today, he cherished no illusion that the large statutory corporation, at least, was or could be democratically controlled or that voting power was the shareholders' significant and all-sufficient safeguard. Writing on "Railway Morals and Railway Policy" in 1854, he declared:

> As devised by Act of Parliament, the administrations of our public companies are almost purely democratic. The representative system is carried out in them with scarcely a check. Shareholders elect their directors, direct-

[1856], p. 43) which urged that "such pitiable inter-meddling" encroached upon the natural rights of individuals without any public benefit.

[118] 8/9 Vict. c. 16. Cf. Loew, *Speech on the Amendment of the Law of Partnership* (1856), p. 38. The suggested articles became the famous *Table A* in the Act of 1862. Cf. *infra*.

[119] A clause borrowed from the contemporary incorporation law of the State of New York. Cf. Lowe, *op. cit.*, p. 39.

[120] Hansard, CXL, 134.

[121] Cf. Berle & Means, *The Modern Corporation and Private Property* (1932).

[122] Ripley, *Main St. and Wall St.* (1927), *passim*; cf. B. C. Hunt, "Recent English Company Law Reform," *op. cit.*, p. 183.

ors their chairman; there is an annual retirement of a certain proportion of the board, giving facilities for superseding them; and by this means, the whole ruling body may be changed in periods varying from three to five years. Yet, not only are the characteristic vices of our political state reproduced in each of these mercantile corporations—some even in intenser degree,—but the very form of government, whilst remaining nominally democratic, is substantially so remodelled as to become a miniature of our national constitution. The direction, ceasing to fulfill its theory as a deliberative body whose members possess like powers, falls under the control of some one member of superior cunning, will, or wealth, to whom the majority become so subordinate, that the decision on every question depends on the course he takes. Proprietors, instead of constantly exercising their franchise, allow it to become on all ordinary occasions a dead letter; retiring directors are so habitually re-elected without opposition, and have so great a power of insuring their own re-election when opposed, that the board becomes practically a close body; and it is only when the misgovernment grows extreme enough to produce a revolutionary agitation among the shareholders that any change can be effected.[123]

The exception of insurance [124] and banking from the new legislation was shortly removed. A bill to extend limited liability to insurance companies failed in 1857, but they received it finally by inclusion within the general consolidation act of 1862. Their activities were not subject to *special* regulation, however, until 1870,[125] despite the fact that the Committee on Assurance Associations of 1853 had so recommended, after laboriously deciding that the business was vested with a public interest which transcended the received "principle of non-interference" by government in matters of trade.[126]

The Act of 1858 [127] made limited liability (except for notes issued) [128] available to joint-stock banks. Thus was discarded, according to *The Times*, an unintelligible distinction which assumed that "the trade in money" differed essentially from all

[123] *Edinburgh Review*, Vol. C, pp. 420–21.

[124] Insurance companies, as we have seen, had been successful for some years in contracting out of unlimited liability.

[125] By 33/34 Vict. c. 61.

[126] *Report, op. cit., passim.*

[127] 21/22 Vict. c. 91.

[128] Thus recognizing, after considerable controversy, the essential difference between the position of an involuntary creditor of a bank in the person of a noteholder, and that of a voluntary creditor in the person of a depositor (cf. *The Economist*, XVI [1858], 530).

other trades.[129] Inevitably, McCulloch fulminated over "hypothetical notions about the symmetry of legal action;" [130] contraction rather than extension of limited liability was in order. The private banking interest, as represented by Henry Drummond, still adhered also to Lord Overstone's view that in banking especially, the old principle was the sound one.[131] The *Bankers' Magazine*, on the other hand, thought the experiment worth a trial, although it expressed serious doubt whether any successful institution would actually exchange their unlimited for limited liability, in view of the price they might have to pay for "the doubtful advantage." [132]

The crisis of 1857, accompanied by several disastrous bank failures,[133] notably those of the Western Bank of Scotland and the City of Glasgow Bank, without doubt accelerated passage of the limiting act; it compelled the Legislature to yield, according to MacLeod.[134] Experience too often suggested, declared *The Economist*, that unlimited liability in theory was "no liability at all in practice." [135] By R. C. Fane, Commissioner in Bankruptcy, it was denominated "a serious public mischief." [136] In the House of Commons, non-limitation was indicted as "a chief moving

[129] February 13, 1858; cf. *The Economist*, XIV (1856), 699.

[130] *Encyclopaedia Britannica, op. cit.*, p. 123. Cf. his article "Money," *ibid.*, XIV, 452; *Commercial Dictionary* (1859), p. 1014; *A Treatise on Metallic and Paper Money, and Banks* (1858), *passim*.

[131] *Bankers' Magazine*, XVIII (1858), 17.

[132] *Ibid.*, p. 213. Cf. *Report of the Select Committee on the Bank Act of 1844* (1858), *P. P.* (1857–8), V, Evidence, QQ. 3520; 4502; 4655. The Bank of Manchester was the first to incorporate under the Act (*Times*, November 4, 1858). As a result "many leading persons" became shareholders and it enjoyed much new business (*ibid.*, City Article, February 17, 1863).

[133] Cf. *The Economist*, XV (1857), 1259; 1289. For a list of failures, 1846–57, cf. City Article, *The Times* (March 3, 1863).

[134] *Theory and History of Banking*, 3rd ed. (1876), II, 390; cf. his *Dictionary of Political Economy* (1863), p. 124.

[135] XV, 1370. Cf. *Report of Select Committee on the Bank Act of 1844, op. cit.*, Q. 3683; and *Westminster Review*, LXIX (1858), 226 f.

[136] *Report of 1854*, Evidence, p. 225. He was, furthermore, "convinced that the English law [had] done more to send English capital to be lost in Pennsylvania and Mississippi bonds, South American, Spanish, and Greek loans and an endless number of other foreign delusions, than all other causes put together. The only attraction that those bubbles held out was that every man knew the extent of possible loss" (*ibid.*, 228).

cause" of a type of joint-stock bank mismanagement which directly aggravated crises.[137] The power of mortgaging to the last farthing the real and personal property of every one of their shareholders enabled banks to become indebted "to an almost fabulous amount in almost all quarters of the money market."[138] One that had recently failed had rediscounted in London bills amounting to over £5 million. These had been "taken without reference to quality, reliance being blindly placed on the shareholders."[139] Such "blind credit" was the basis of *The Economist's* argument for the change.[140] Superior management would result from limitation of liability inasmuch as it would ensure a better class of shareholders and, *ipso facto*, more competent directors. A bank's credit would then depend much more upon prudent management than upon mere ultimate claims against shareholders.

The general right to all of the privileges of incorporation was conditioned only by the requirement of publicity, though initially the amount exacted was indeed slight. For, as we have seen, the policy inaugurated by Gladstone in 1844 had suffered partial eclipse. Several of the earlier requirements were emasculated in the new legislation [141] despite much well-informed insistence to the contrary. Before the Royal Commission of 1854 it was argued, for example, that the true principles upon which the law should be based were: "Full freedom of association, guarded by well-devised regulations to insure publicity and to defeat

[137] In contrast, Edmund Potter observed: "No law can prevent individual expansion; periodical checks, healthy storms will come: and, . . . the remedy now urged most prominently, at the beginning and end of every monetary article in *The Times*—Limited Liability . . . must inevitably lead by new modes to wilder speculations." (*On Banking with Limited Liability*, [1858], pp. 19–22.)

[138] Hansard, CVIIIL (1857), 360–2; cf. *Report of 1854*, Evidence, p. 225.

[139] *The Economist*, XVI (1858), 531.

[140] XV, 1370; XVI, 167. Cf. *The Law of Limited Liability in its Application to Joint Stock Banking, Advocated*, London (1863). For an earlier argument of similar tenor, cf. *Report of 1851*, Evidence, Q. 929, and *Circular to Bankers* (November 7, 1851). See also, Henry Ayres, *Financial Register* (1857), p. 171 f., and *Monetary Times* (January 30, 1858).

[141] *Supra*, p. 95. Lord Wenslydale's efforts to secure compulsory filing of half-yearly balance sheets were defeated in the House of Lords in the course of debate on the consolidation act finally passed in 1862. Cf. Hansard, CLVI (1860), 2218.

fraud."[142] Or, in the words of another witness, "to justify confidence in their stability and management, it should be an imperative condition annexed to limited liability, that all [joint-stock companies] should be allowed only on the most perfect system of publicity as to their affairs."[143] However, over the next seventy-five years, the requirements were in several respects to be broadened and made more effective. By gradual steps the contents of the prospectus, in particular, have been closely defined and the liabilities of and remedies against directors made more explicit. Regular disclosure of accounts, however, (unless the provisions of *Table A* were adopted) remained until 1928 within the discretion of directors.[144] And, although *Table A* [145] contained admirable precepts for their guidance, directors seem to have been governed to a large extent, in the selection of information to be made public, by a paternal notion that they knew best what shareholders ought to want. Protests of shareholders have in practice served only to confirm directors in their opinion of the unfitness of shareholders to make decisions which directors were always perfectly willing to make for them.[146] Meanwhile, several more eruptions of company promotion and their attendant evils were necessary to provide sufficient stimulus to cause the erection of a more adequate framework of regulation and to place some limitations upon the doctrine of *caveat emptor* in so far as it was applicable to investors.[147]

[142] G. R. Rickards, *Report of 1854*, App., p. 233.

[143] *Ibid.*, p. 39; cf. p. 62. Robert Lowe's position is of special interest in view of his part in the enactment of the limited liability acts: "The state ought to offer its aid to authenticate the amount of capital and to audit and certify their annual balance sheet and as the evading of this authentication would be a sign of fraud, I see no objection to making it compulsory." (*Ibid.*, p. 84.)

[144] The requirements are still seriously inadequate in several respects. Cf. B. C. Hunt, "Recent English Company Law Reform," *op. cit.*

[145] See Appendix, *infra.*, pp. 160–62.

[146] It is reported that in answer to a pertinent query from a shareholder at a recent meeting of a large company the Chairman responded: "Wouldn't you like to know!" In 1877, a member of the Committee on the Companies Acts, 1862 and 1867, proposed to make the accounting provisions of *Table A* mandatory upon all companies and to require the filing of accounts and balance sheets with the Registrar, but nothing came of the suggestions (*P. P.* [1877], VIII, viii).

[147] To mid-century advocates of publicity, safeguarding creditors was perhaps a matter of greater concern than protection of shareholders. E. W. C[ardwell]

But, if legislation lagged, the shareholder was nevertheless afforded an increasingly powerful measure of protection in the striking growth of non-statutory precedent. For, in correlation with the great expansion of corporate enterprise in the latter half of the nineteenth century, came a marked development of the profession of public accounting and auditing, a strengthening of its technique, an elevation of its standards, and the achievement of a position of importance in the business life of Great Britain approached, until very recently, in no other country. Indeed, the development of the profession bears an integral relation to that of corporate organization in Great Britain.[148]

Today, the most important characteristic of English company law and practice is undoubtedly the position of the auditor. With relation both to shareholders and to directors he occupies an independent status. "A watch dog, but not a bloodhound," in the words of a classic dictum,[149] he is appointed by the shareholders and is charged with doing for these silent partners of an enterprise what they might do for themselves, if actively engaged in its management. As we have seen, the appointment of auditors to receive and examine the accounts of companies formed there-

wrote to *The Times* (January 27, 1864): "With an unlimited company the creditor looks to the solvency of the shareholders; with a limited company, his only reliance is the position of the business. If it were right that the public should have the means of ascertaining this in the case of a bank or an insurance company, it is, at least, equally important that it should be obtainable from other companies, especially where the creditors have no other securities than the actual assets, and to whom therefore a knowledge of the true position of affairs is essential. Balance sheets are not now required to be registered, nor is any power given to the public or creditors to inspect them. This is considered an extraordinary oversight, for the principle of limited liability should be compulsory publicity. How can the public know whether to trust a company, if ignorant of the state of its position?" *The Times* remarked editorially (June 30, 1864): "What the law did was [to provide] an effectual method of notifying to the public upon what terms a certain number of individuals associated into a company proposes to deal. Thenceforward a customer, instead of relying on the supposed wealth of particular members would rely upon the assets of the company as disclosed by the particular reports."

[148] Associations of professional accountants arose during the fifties. The Edinburgh Society was chartered in 1854 and others were formed in various commercial centers over the following decades. They have maintained a separate existence in Scotland, though action in professional matters is coördinate. The several societies in England and Wales, on the other hand, were combined in 1880 to form the Institute of Chartered Accountants.

[149] Per Lord Lopes, *in re Kingston Cotton Mill Company, Ltd.* (1896), 2 Ch. 279.

under was prescribed by Gladstone's Act of 1844 as a prerequisite of legal sanction to do business. Similar provisions were incorporated in the Act of 1845 which governed companies established by *special* Act of Parliament. And while auditors were not required to be accountants, they were entitled to employ their assistance. The compulsory requirement was dropped in the case of companies formed under the general statutes of 1856 and 1862. The provision was retained, however, in *Table A* and probably adopted by a majority of concerns.[150] Actually, as a result of the combined influence of growing complexity of accounts and fear of penalties, practice gradually substituted the professional for the lay auditor. In the fifties, for instance, the *Circular to Bankers* was arguing that an auditor should be made to feel that he was "responsible—*individually and personally responsible*—for whatever statements" were delivered to shareholders.[151] In his *Personal Liabilities of Directors of Joint Stock Companies*,[152] H. L. Morgan advised directors, particularly in view of the recent conviction of several bank directors and of the stringent provisions of the new Fraudulent Trustees Act (1857),[153] to avoid "*dilettanti* auditors" and to take care that audits were "a reality and not a sham . . . independent and exact," if they wished to avoid penalties.[154] Advising prospective

[150] A bill to provide compulsory audit for *all* joint-stock companies (*P. P.* [1867], V) failed in 1867. In 1876, the author of a winning essay in a competition held by the Institute of Accountants stated that the accounts of joint-stock companies of every description, including almost every mercantile business, were "generally audited". Cf. C. J. Relton in *Essays on Auditing*, London, (1876).

[151] October 4, 1856 (italics in original).

[152] *Op. cit.*, pp. 5–13.

[153] 20/21 Vict. c. 54.

[154] The provisions of the Fraudulent Trustees Act were embodied as follows in the Larceny Act of 1862 (24/25 Vict. c. 96, s. 84): "Whosoever, being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written Statement or Account which he shall know to be false in any material Particular with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the Court to any of the punishments which the Court may award." (Penal servitude not exceeding seven, nor less than three years; or

purchasers of any enterprise to secure expert analysis thereof first, *The Economist* declared in 1866 that "accountants were becoming a profession like lawyers."[155] In the eighties it was urged:

> The increasing extent of factories, the subdivision of capital by means of joint-stock companies, and the conflicting interests that arise in regard to preference shares and borrowed capital, enhance greatly the importance of correct systems of account. Qualified book-keepers should be employed to arrange and check factory accounts and the profession of accountant is rising accordingly.[156]

Compulsory and independent audit for banks was legislated in 1879 in consequence of the spectacular failure of the Bank of Glasgow. By 1900, when the appointment of auditors became compulsory for *all* companies, the accounts of most of them were not only customarily audited, but were, in fact, audited by chartered accountants.[157] The best business practice had so far outrun statutory minima that its translation into law was inevitable. Indeed, by that time it was commonly said in London that dividends were in effect declared by a leading firm of public

imprisonment for any term not exceeding two years, with or without hard labor, and with or without solitary confinement). It was under this statute, *not* under the Companies Acts—as so frequently misstated in the United States—that the Kylsant prosecution was laid seventy years later (*Rex* v. *Kylsant* [1932], 1 K. B. 442).

[155] XXIV, 1511.

[156] Preface to E. Matheson's, *The Depreciation of Factories and Their Valuation* (1884).

[157] Cf. *The Accountant*, XXVI (1900), 475 and B. C. Hunt, " 'Auditor Independence,' " *The Journal of Accountancy* (June, 1935). It is to be mentioned, however, that prior to the Bankruptcy Act of 1883, which established the office of Official Receiver, a more important proportion of the work of public accountants was concerned with the winding up of the affairs of bankrupts. That Act took away a considerable part of work which had fallen to accountants under appointment by the courts as official liquidators. The duties involved were especially important for the years immediately following the Act of 1862, "the best friend the profession ever had," which prescribed that such business be in the hands of disinterested persons (cf. B. Worthington, *Professional Accountants* [1895], p. 50). In the bitter days following the crash of 1866 (*infra*), the part played by accountants was such that Newmarch declared to the Select Committee on the Liability Acts that: "The constitution of the country consisted of four parts, Queen, Lords, Commons, and liquidators of public companies" (*P. P.*, X [1867], Evidence, Q. 1069). In fact, there appears to have been a period when "to have your office entered by an accountant was to be avoided." (Cf. W. J. Back, "The First Half Century of *The Accountant*," *Economic Journal*, XXXV [1925], 493–5.)

accountants, company directors being merely 'guinea pigs'. Half a century before, Lord Overstone had declared that there was no safety or security for the immense capital invested in joint-stock companies "if a sound audit of accounts be not made common to them all."[158]

In the course of a leading article devoted to a current Parliamentary return of company registrations,[159] *The Times* observed in 1862 that the history of commercial enterprise in modern times is the history of Joint Stock Companies.[160] Here was "a record of schemes "vaster and more various than were ever conceived by the most restless and visionary of despots . . . one wonders what field of energy can have been left to individual or private partnerships . . . Nothing which can minister to pleasure or utility from the manufacture and sale of ice in Liverpool to the cultivation of coffee in India has escaped the vigilance of this organized competition . . . How many of the schemes . . . would have been realized under a system of unlimited liability cannot be conjectured . . . We may fairly infer from the continued number of these associations that they supply a want which has been widely felt. . . . There is nothing to sanction a belief that, upon the whole, the diminished risk attached to Joint Stock Partnerships has borne further fruit in an increase in fraud and bankruptcy."[161] In less than two years following the Act of 1856, over two hundred "old" and nearly seven hundred "new" companies were registered.[162] From 1856 to the passage of the Act of 1862, almost 2500 companies were incorporated with limited liability. (For a classification, cf. Table XII). In 1864, the paid-up capital of those still on their legs exceeded thirty million pounds.[163]

This considerable group of companies was but a prelude, however. With the passage of the great consolidating statute of

[158] [Daniel Hardcastle], *op. cit.*, p. 32.
[159] August, 1859, to December, 1861.
[160] December 1, 1862.
[161] *Ibid.*
[162] *Return . . . under the Joint Stock Companies Act (1856) . . . to March 31, 1858, P.P.* (1857-8), LIII.
[163] *Return of all joint stock companies, P. P.* (1864), LVIII.

TABLE XII

LIMITED COMPANIES REGISTERED, 1856–62[164]

(Excluding abortive and small companies)

Description	1856–59	1860–62	Description	1856–59	1860–62
Coal and Iron Mines	40	25	Farming Accessories	24	7
Lead, Copper, etc. Mines	100	107	Petty Money-lending	34	20
Quarries	16	29	Insurance	.....	3
Iron Manufacture and Engineering	11	13	Financing:		
Iron and Steel Products	.....	6	Home	2	.....
Specialised Engineering	5	10	Colonial	.....	2
Railway Rolling Stock	2	12	Foreign	.....	.....
Shipbuilding	4	5	Banking:		
Lead, etc. Manufacture	3	5	Home	.....	14
Briquettes, Shale Oil, etc.	2	11	Colonial	.....	5
Clay, Bricks, Cement	8	14	Foreign	.....	2
Coastal Shipping	23	13	Mines and Lands:		
Ocean Shipping	10	8	Colonial	18	30
Omnibuses, Trams, etc.	7	9	Foreign	26	23
Cables and Telegraphy	6	3	Miscellaneous:		
Cotton Manufacture	13	101	Colonial	2	4
Woollens and Worsteds	2	1	Foreign	2	1
Miscellaneous Textiles	14	8	Railways, etc.:		
Household, etc. Goods	22	17	Colonial	7	10
Food and Provisions	28	13	Foreign	6	12
Breweries, Flour Mills, etc.	16	19	Mercantile and Trading	6	3
Hotels, Restaurants, etc.	15	24	Unclassified	16	20
Land and Buildings	19	46	(i) General Total	549	693
Theatres, etc.	11	16	Public Halls	45	38
Newspapers	13	7	Gas and Water	147	103
Paper and Printing	7	11			
Chemicals, etc.	9	4	(ii) Grand Total	741	834

1862 [165]—"the *Magna Charta*" [166] of English company law and the written constitution of English joint-stock enterprise—the curtain rose on another astonishing boom.

[164] From H. A. Shannon, *op. cit.*, p. 422. Cf. Levi, *op. cit.*, p. 36. His summary of all promotions (1856 to 1862 incl.), taken from Parliamentary Returns, totals 2636 with a nominal capitalization of £185 million.

[165] 25/26 Vict. c. 89.

[166] Palmer, *Company Law*, 7th Ed. (1909), p. 1.

CHAPTER VII

THE EIGHTEEN SIXTIES: CONCLUSION

There remain for brief consideration in this volume some aspects of "that stormy decade," as Lord Goschen termed the sixties,[1] in particular, the dramatic bulge of new promotions in old as well as in new directions which followed upon "the emancipation of joint-stock enterprise;"[2] the conversion of numerous and important private firms to the corporate form; and the effects of the crisis of that "gloomy, eventful and ominous year,"[3] 1866.

Commenting on new companies launched over the year preceding, *The Times* prophesied on January 1, 1863: "Should a fair proportion [of them] meet with ordinary success, they will hardly fail to revive speculative enterprise. . . . It is nearly twenty years since the last great national fever. . . . We shall live to see the same again." *The Economist* gauged the position of Lombard St. in January of 1862 as admirable, with a great deal of capital available for investment.[4] A year later it declared that the drafts of the new companies upon the national resources had been inconsiderable in comparison with their total amount.[5] As in earlier periods, cheap money—"a decided plethora"[6] (following the liquidations of 1857-8)—had again proved propitious to the germination of corporate enterprise and speculation. In the four years, 1863-66, some 3500 limited companies were

[1] *Essays and Addresses on Economic Questions* (1905), "Introductory Note," p. 1.
[2] *The Times* (January 16, 1865).
[3] *Ibid.* (December 31, 1866).
[4] Vol. XX, p. 1.
[5] Vol. XXI, p. 2. Cf. *ibid.*, p. 1373.
[6] *Shareholders' Guardian* (March 1, 1864), p. 131.

registered with a nominal capital of £650 million![7] Approximately 900 of these offered shares to the public.[8] By 1865, *The Times* was sufficiently impressed to exclaim that the whole country, if not the world, was growing every day into "one vast mass of impersonalities."[9]

Promotion of new joint-stock banks seems to have led the way. In fact "steam pressure . . . in the manufacture of banks" shortly displaced the hesitation which had prevailed (*supra*) immediately after the passage of the Act of 1858. Some twenty were formed, 1860-62 (cf. Table XII). As the *Bankers' Magazine* wrote also in the latter year: "It was scarcely supposed that the introduction of a few schemes would lead to their extension in all directions, or that they would be made available for almost every clime and country."[10] Another fifty were established during the next three years (cf. Table XIII). However, the "finance company" was an even more striking development of this period.

[7] Levi, *op. cit.*, p. 26; cf. Hansard, CLXXV (1867), 1372. Annual figures (from Levi, *loc. cit.*) are as follows:

	Number of Companies	Nominal Capital
1863	760	£137,000,000
1864	975	235,000,000
1865	1014	203,000,000
1866	754	74,000,000
	3503	£649,000,000

[8] New Companies Offering Shares to the Public, 1863–1866:

Year	Number of Companies	Capital Authorized	Capital Offered	Deposits
1863	263	£100,053,000	£ 78,135,000	£ 8,875,550
1864	282	155,887,500	106,523,000	12,545,800
1865	287	106,995,000	75,578,900	12,174,790
1866	44	10,295,000	7,920,000	2,052,500
Total	876	£373,230,050	£268,156,900	£35,648,640

Compiled annually by Spackman & Sons for *The Times*; cf. *The Times* (December 29, 1866).

[9] May 19, 1865.

[10] XXII (1862), 337; 771

Parisian fashions in finance crossed the Channel in the early sixties. Not only English but also French banking principles were "on a crusading tour throughout the world."[10a] A small horde of companies [11] modelled on the *Crédit Mobilier* and the *Crédit Foncier* rose up in London and enjoyed a hectic, if brief, day of speculative favor. In contemporary words, "there arose a new institution . . . the Finance Company, or Discount Company, or General Trading Company, or simple Bank, emerging from the straight-laced chrysalis into the gaudy and volatile butterfly, in the form of a Company (limited), and for the express purpose of sharing the profits of trade, [combined] in one the Bank, the discounter, the railway, the iron master, the merchant, the stock-jobber, and that specious form of limited liability which induces the hope of profits on a very large sum with the risk of a very small one." [12] More particularly, the prospectus of the General Credit and Finance Company of London (May, 1863) [13] announced that its objects were "to negotiate loans and concessions; assist industrial enterprise, public works and railway undertakings; negotiate Foreign, Indian, and Colonial Bonds; conduct mercantile transactions; and establish agencies for large commission business; in a word to undertake all such operations as an intelligent and experienced capitalist might effect on his own account with a capital of millions."

Imitators quickly followed upon its heels and in four years fifty finance and discount companies offered shares to the public.[14] Some of them were formed by joint-stock banks to handle types of security loans which did not conform to the City's traditions of commercial banking. Others were launched by contractors and promoters for the purpose of limiting their risks and making their commitments more liquid.[15] In a current

[10a] Goschen, *op. cit.*, p. 22.

[11] Cf. Jenks, *op. cit.*, p. 250, and Chapter VIII, *passim*; also, *The Times* (December 31, 1866).

[12] *The Times* (May 14, 1866).

[13] Quoted by Jenks, *op. cit.*, p. 249.

[14] See Table XIV. Twenty-nine were enumerated by the *Bankers' Magazine* in January, 1865, Vol. XXV, p. 96.

[15] Cf. Jenks, *op. cit.*, p. 250.

expression, the finance companies chaperoned others into the world.[16] Promoters of a railway, for example, having obtained their Act of Parliament, proceeded to issue securities to a construction contractor who in turn raised cash on them as collateral from a finance company. *The Economist*, since 1860 edited by Walter Bagehot, and now in the full swing of teaching the money market broad principles of sound banking, was more than suspicious of such business:

> A bill of exchange drawn against goods *bona fide* produced and sold is a security representing something which the ordinary consumption of the country will carry off and pay for, and is therefore a safe and proper instrument for circulation among bankers or bill brokers. A bill of exchange drawn in reality against an unfinished work is a pure speculation on the possibility of that public work yielding a dividend on its cost, and finding purchasers in detail for its bonds and shares is not therefore a proper instrument in any sense for Lombard St. purposes.[17]

Some months before the panic broke, it had warned that the two types of business undertaken by the new money lending companies were essentially distinct, that their combination in one concern was fraught with danger.[18] And inasmuch as the shares of many of them had declined from a premium to a discount, it inferred that the public had at length become painfully alive to the truth that there were blanks as well as prizes in the business of money lending.

The spectacular uprush of the finance companies (and new joint-stock banks) was a stimulus to promoters generally. As the *Shareholders' Guardian* remarked early in 1864, "when it was perceived that limited liability would be accepted even in the circles of the banking community, scarcely any bounds were placed to the animation which followed, and limited liability soon became patronized not only by banks but by every other

[16] Cf. *The Economist*, XXII (1864), 921.

[17] XXIV (1866), 498 (written before the panic). When the storm had struck (May'10), *The Times* observed: "Owners of money [had] handed it over with the expectation of receiving four or five times the amount of interest normally returned. The Finance Companies [thus] bound to exact these rates . . . were compelled to make corresponding reductions in the quality of the securities for their advances, and the results are now what we see."

[18] February 24, 1866 (XXIV, 21); cf. XXII (1864), 1045.

conceivable kind of undertaking, financial and industrial."[19] *The Times* complained in 1864 that companies were multiplying daily and jostling private traders in every kind of business. Not only their numbers but also their objects "would have staggered Adam Smith." [20] In 1866, it asserted: "Of late years Limited Liability

TABLE XIII

LIMITED COMPANIES REGISTERED, 1863–5[21]

(Excluding abortive and small companies)

Description	1863–65	Description	1863–65
Coal and Iron Mines	96	Farming Accessories	21
Lead, Copper, etc. Mines	66	Petty Money-lending	30
Quarries	62	Insurance	45
Iron Manufacture and Engineering	54	Financing:	
Iron and Steel Products	16	Home	16
Specialised Engineering	24	Colonial	16
Railway Rolling Stock	13	Foreign	15
Shipbuilding	17	Banking:	
Lead, etc. Manufacture	7	Home	23
Briquettes, Shale, Oil, etc.	21	Colonial	5
Clay, Bricks, Cement	19	Foreign	22
Coastal Shipping	20	Mines and Lands:	
Ocean Shipping	19	Colonial	40
Omnibuses, Trams, etc.	13	Foreign	49
Cables and Telegraphy	6	Miscellaneous:	
Cotton Manufacture	21	Colonial	9
Woollens and Worsteds	11	Foreign	15
Miscellaneous Textiles	21	Railways, etc.:	
Household, etc. Goods	40	Colonial	4
Food and Provisions	37	Foreign	29
Breweries, Flour Mills, etc.	40	Mercantile and Trading	24
Hotels, Restaurants, etc.	101	Unclassified	48
Land and Buildings	103	(i) General Total	1,334
Theatres, etc.	36	Public Halls	42
Newspapers	16	Gas and Water	153
Paper and Printing	19		
Chemicals, etc.	25	(ii) Grand Total	1,529

[19] March 1, 1864; cf. *ibid.* (November 17, 1863 and July 12, 1865); and *Bankers' Magazine*, XXV (1865), 906–7. Jenks, following *The Times*, points out that the great conservative private banks would have nothing to do with company promoting even at home (*op. cit.*, p. 248).

[20] June 20, 1864.

[21] See note Table XII *supra*.

has invaded most departments of mercantile and manufacturing business."[22] A glance at Tables XIII and XIV would seem to bear this out. However, the invasion of manufacturing was much the more extensive and important.

TABLE XIV

ANALYSIS OF NEW COMPANIES OFFERING SHARES TO THE PUBLIC, 1863–1866[23]

Kinds of Companies	Number of Companies	Capital Authorized	Capital Offered	Deposits
Manufacturing and Trading	283	£84,770,000	£64,902,900	£10,114,040
Banking	58	72,950,000	51,950,000	5,252,750
Financial and Discount	50	69,350,000	45,750,000	4,391,250
Railways	44	36,796,000	25,516,000	3,385,250
Assurance	33	28,775,000	15,375,000	1,677,500
Shipping	43	25,238,000	19,353,000	1,869,100
Building and Investment	38	13,485,000	9,745,000	1,810,000
Mining	147	12,448,500	11,145,000	3,018,800
Hotels	82	7,640,000	6,752,000	1,293,350
Gas	17	3,875,000	3,185,000	587,500
Miscellaneous	81	17,903,000	14,483,000	2,249,100
Totals	876	373,230,500	268,156,900	£35,648,640

Of almost 300 'manufacturing and trading' concerns which offered shares to the public and on which was paid nearly a third of the total capital actually raised during the period, the great majority were undoubtedly for manufacturing purposes. There were over eighty effective registrations, 1863-65, in iron, steel, and specialized engineering, alone. Only twenty-four 'mercantile and trading' companies, in all, were so registered (cf. Table XIII). The statement of *The Times* that trade was fast becoming

[22] May 24, 1866. Goschen used identical words (*op. cit.*, p. 1).

[23] Compiled by Messrs. Spackman & Sons; cf. *The Times* (December 29, 1866). The list "includes only such companies as the public have been asked to subscribe to. It does not include all the companies 'registered' as many never got beyond registration, and others are registered for private purposes only." *The Times* published annual figures from the same source at the end of each year beginning in 1863. They were reprinted in detail in the annual "Commercial History" of *The Economist*.

"a mere collection of machines" was somewhat of an exaggeration, even though in some important instances the English merchant was in fact "being exchanged for Firms, Companies, and Associations."[24] We have seen that in earlier periods few companies in the distributive trades actually remained on their feet for very long. By another decade the movement was to gather considerable momentum.[25]

The promotion of hotel and building companies is another interesting development of the sixties. Insurance and mining companies in force are familiar faces. There was also a large crop of shipping companies. Noteworthy too is the continued development of railways, "a new railway mania."[26] From 1860 to 1866, Parliament sanctioned 687 new lines.[27] In the latter three of those years, 44 new companies offered shares to the public. By the end of 1865, a total of 14,289 miles were open to traffic and the colossal sum of £456 million had been raised.[28]

Of greater significance, however, than the new companies and new kinds of companies was the conversion of established private firms into limited companies.[29] Discussing the growth of negotiable investments during the preceding thirty years, *The Economist* declared in 1864: "Now, above all, we are commencing the conversion of unlimited and unnegotiable undertakings into limited and negotiable, whereby a wider choice of good investments will be offered to the capitalist."[30] *The Times* called attention to the fact that of 171 new companies promoted during

[24] May 19, 1865.

[25] Cf. Clapham, *op. cit.*, II, 310–11. His statement (*ibid.*, p. 116) that "Joint Stock manufacturing companies existed in 1871, but were rare and unimportant" is too strong. Cf. Table XV, p. *infra*.

[26] Cf. *Shareholders' Guardian* (December 17, 1863).

[27] *Report of Royal Commission on Railways, P. P.* (1867), XXXVIII, Part II, p. 345.

[28] *Ibid.*, Part I, p. viii.

[29] Cf. Clapham, *op. cit.*, II, 360.

[30] XXII (1864), 1518. Among recent conversions, John Brown & Co. of Sheffield; Smith, Knight & Co.; the Ebbw Vale Co.; the Humber Iron Works; the Millwall Iron Works; and Muntz's Metal Co. were "all well established." The following, in addition, had already paid substantial first dividends: Agra & Masterman's Bank (18%); Consolidated Bank (10%); Jones, Loyd & Co. (30%); Chas. Cammell & Co. (20%); Fairbarn Engineering (10%); Patent Shaft & Axle (15%); and the Fore St. Warehouse (10%). (*Ibid.*)

the first half of that same year, fourteen per cent were for the transfer of various industrial establishments already in existence into joint-stock associations.[31] The *Annual Register* reported that in 1865: "The limited principle was developed in a somewhat novel direction. Instead of being applied to new undertakings, it was in many cases directed to the conversion of old private firms into companies [by] absorption of the original house with the infusion of new blood into the management and an extension of capital."[32] Obviously, contemporaries were impressed.[33]

Although it is impossible to measure the proportion of total business enterprise so converted, there is evidence to show that it was by no means inconsiderable. There were a few important conversions in 1863, that of Muntz's Metal Company, for example. In the year following, there were approximately another hundred, a hundred and fifty more in 1864, and twenty-five others in 1866, the year of the panic.[34] While a few of them were important 'trading' concerns, many more were industrials—colliery, metallurgical, and a multitude of miscellaneous manufacturing enterprises. As well, numerous banking, shipping and building companies assumed the corporate form. In the iron trades, the development was particularly pronounced. To quote *The Times:*

> The extensive iron works of the country were up to within the last few years almost entirely in the hands of private capitalists, but since the passing of the Limited Liability Act, the joint-stock principle has been gradually adopted, not only in opening new works, but many of the proprietors of old iron making establishments have disposed of their interests to limited liability companies. Whether this will prove advantageous to the public or those that have invested their capital in the undertakings time alone will prove, but it is a singular circumstance that the shares of several of the companies that have paid from 7½ to 10 per cent. dividend are quoted below par, which indicates pretty conclusively the opinion which the public hold of such securities as permanent investments. About twenty years ago the iron works of the Kingdom fell into the hands of joint-stock companies, and a disastrous failure was the result in nearly every instance, and some predict

[31] July 1, 1864.

[32] *Annual Register* (1866), 187; cf. *ibid.* (1867), p. 2.

[33] Cf., also, *The Economist* (April 30, 1864); *The Times* (June 16, 1865); *Shareholders' Guardian* (December 13, 1865); and *Report of 1867*, Evidence, Q. 625.

[34] Cf. *Shareholders' Guardian* (1863–1866), *passim.*

a like result again, while others maintain that the joint-stock principle is far better understood at the present time . . . and that discreet and honest managements are the only requisites to insure success for a large proportion of the iron making companies.[35]

The general movement was not without its critics and there were some conversions, particularly in banking,[36] which were little more than a screen for fraud. The *Shareholders' Guardian* protested: "Let the votaries of limited liability symbolize it by a statue—of a female, for instance, to represent the benign influence it exercises, and with a whitewash brush in her hands, to denote the services rendered to the impecunious public. But seriously, when is this craze for transferring business to joint-stock companies to end? It is fast becoming a nuisance and will eventually become a curse. We have seen concerns more familiar with bailiffs than with the purchasing public, suddenly blaze out in all the magnificence of a 'subscribed capital' and 'limited liability.' "[37]

The failure of Overend, Gurney, Ltd. on May 10, 1866 pre-

[35] June 10, 1865. The *Shareholders' Guardian* (April 26, 1865) found coal and iron companies "much in favor with the public." The complaint that such concerns in the hands of joint-stock companies "invariably proved unsuccessful," happily no longer existed. Cf. *supra*, p. 78.

[36] Such as that of Overend, Gurney & Co. a conversion described by the *Bankers' Magazine* at its announcement as "the greatest triumph which limited liability has yet achieved"—as not only "an additional illustration" of the soundness of the new principle, but also of "the confidence with which it may be regarded by every class of investors." (XXV [1865], 907–9.) *The Economist* was more guarded, if not suspicious. It approved of the change because as a limited company the concern would thenceforth have to publish an account of its affairs, in particular, "the proportion between the pure bill-broking business and the *extra* and accessory business." (Cf. XXIII (1865), 845–6.) In subsequent litigation (*in re Oakes* v. *Turquand* [Official Liquidator]), Chelmsford, L. C., observed: "It is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood. If the real circumstances of the firm of Overend, Gurney & Co. had been disclosed, it is not very probable that any company founded upon it would have been formed. . . . But as the experiment was to be made with other people's money as well as with their own, I think they were bound to furnish others the information which they possessed themselves, and so enable others to form a competent judgment as to the prudence of embarking in the new concern." (2 A. C. [1867], 342 ff.)

[37] December 14, 1864.

cipitated the panic of Black Friday. No single bankruptcy had ever caused "so great a shock to credit." There ensued the greatest agitation ever known in the City. Several banks failed within the week and a number of the new credit companies, "framed on the French model," were summarily crushed.[38] "We have called this panic 'financial,' " the editors of *The Times* explained on one of the fateful days, "because it is in the system of financing that it has originated and because the new Finance Companies feel the effects most severely."[39] In their wake, of course, followed many of the new promotions in other fields—over 200 of them were snuffed out in less than three months.[40]

Limited liability suddenly became extremely unpopular; it had "palpably and plainly intensified a panic;"[41] indeed many were disposed to father on it all the disasters that had occurred.[42] A universal outcry against all joint-stock companies[43] broke forth. The country was discouraged and suspicious, the House of Commons almost hostile.[44] Significantly, it appointed a Committee on the Limited Liability Acts but none, as on various former occasions of financial distress, to review the Bank Act. Apologists argued, on the other hand, that the principle of limited liability was not really at fault. The sudden removal of "the long standing interference of the Legislature with individual freedom" had quite naturally been followed "by a rush of undertakings that would otherwise have been in the course of gradual and

[38] Cf. *The Times* (December 31, 1866). "Contract, Finance, and Discount Companies' shares," wrote *The Economist* (XXIV [1866], 463), "are almost exterminated."

[39] May 10, 1866.

[40] For a list of over 150 which were in Chancery by the first of August, cf. *The Economist*, XXIV, 909–10; some 50 more were on the verge of compulsory, or were in process of voluntary liquidation (*ibid.*). *The Economist* thought that many of the companies of the period were "far better suited to individuals than to associated enterprises." (*Op. cit.*, p. 1196.)

[41] *The Economist*, XXV (1867), 982.

[42] *Annual Register* (1867), p. 188; cf. Hansard, CLXXXIV (1866), 3; letter of H. Drummond Wolfe to Gladstone quoted in *The Times* (June 11, 1866); and *Companion to the Almanac* (1867), p. 24.

[43] *Report of Royal Commission on the Stock Exchange, op. cit.*, Evidence, Q. 7149.

[44] Cf. *Economist, loc. cit.*; Hansard, CLXXXV (1867), 1370–87.

rational development for years past."[45] Released from such tyranny of restriction, men had naturally plunged into extremes.[46] Or, in the judgment of *The Economist*: "The Companies Act of '62 chanced to come into operation at a time when all the elements of a career of extravagance and folly were collected and it became the accidental pretext for the form in which the disorder manifested itself."[47]

One of the special evils of this period [48] was the latitude open to promoters in the margin of capital allowed to be subscribed beyond the portion paid up.[49] It had produced a reluctance in *bona fide* investors to take a small investment involving a large risk and had tempted small capitalists to assume liabilities beyond their means. Many were unwittingly in the position of a banker whose acceptances exceed his assets. Before the crash, indeed, *The Times* [50] had called attention to this anomaly: "Companies fixed either their capital too high or their first calls too low." Shareholders were thus without that security which legislation had been especially designed to give. After the crash, painful experience taught that their limited responsibility was little more than nominal.[51] A bill introduced to allow companies to reduce the amount of their shares was thrown out in the Lords. Of the leader of the opposition thereto, it was said: "Commerce has her fanatics as well as religion, and we incline to the belief that Lord Overstone would cheerfully march to the stake or send any one else there in the holy cause of Unlimited Liability—that is, the restriction of competition in enterprise!" [52]

However, the Committee appointed to review the existing statutes recommended that such permission be granted upon the

[45] *Annual Register, loc. cit.*, and *The Times* (December 30, 1865).
[46] *Companion to the Almanac, loc. cit.*
[47] "Commercial History of 1866," p. 5.
[48] Cf. Giffen, *Economic Inquiries and Studies* (1904), I, 120; and *Shareholders' Guardian* (May 23, 1866).
[49] Cf. *The Times* (May 24, 1866). In fact, less than 10% of the subscribed capital offered by new companies over the four years, 1863–66, had been paid up in cash (cf. Table XIV).
[50] September 19, 1865.
[51] *Ibid.* (December 31, 1866).
[52] *The Times* (June 11, 1866).

consent of creditors. Passing over many of the long standing objections to limited liability,[53] it refused to countenance impairment of the principle thereof, namely, the principle of freedom of contract. "Asked to confine limited liability," in the words of *The Economist*, the Committee "extended and completed it."[54] That journal and several of its correspondents had urged more publicity—in particular, the publication of *all* documents relating to promotion.[55] Unpleasant truths neatly veiled by the prospectus were to be found oftentimes in memoranda and articles of association.[56] However, the Committee seems to have adhered to Newmarch's view that the true policy was to leave the parties to look after themselves. The less interference, the better. The moment the Legislature took upon itself "the function of finding common sense for mankind," it would do a great deal of mischief.[57] But, while the Act of 1867,[58] apart from giving power to reduce capitalization and authorizing directors with *un*limited liability, added only one more item to the information required to be made public, it marks the beginning of statutory definition of the contents of the prospectus. The date and names of parties to any contract made prior to the issue of any prospectus were henceforth to be specified therein. Although a decade later another Parliamentary Committee (of which Robert Lowe was chairman) was to be "much impressed with the importance of securing, as far as possible in the formation of a company a full disclosure of everything likely to influence anyone proposing to become a shareholder,"[59] the experience of yet another generation was to be necessary to provoke the establishment of more stringent regulation of promoters and directors.

* * * * * * * *

[53] Cf. *e.g.*, Evidence, QQ. 765; 1733.
[54] *Loc. cit.*
[55] XXIV (1866), 33; 126.
[56] XXV (1867) 323; cf. XXVII (1869), 1489 f.; XXXI (1873), 125.
[57] *Report of 1867*, Evidence, QQ. 959; 1065.
[58] 30/31 Vict. c. 131.
[59] *Report of 1877*, p. iii.

After more than a century of struggle against deeply rooted prejudice and widespread misconception, and having weathered the storm of the sixties, freedom of incorporation was a definitively accomplished fact. The joint-stock company and the indispensable incident of limited liability, both at first prohibited except under special and rare Parliamentary discretion or favor, had later become a carefully guarded bureaucratic concession. Henceforth, they were privileges to be recognized as of common right.

TABLE XV

COMPANIES FORMED AND REMAINING, 1844 TO 1868[1]

	Number Formed	Number Remaining	Per cent Remaining
Gas	678	535	85
Water	91	65	72
Public Buildings	364	233	66
Building	74	45	60
Land	265	146	55
Cotton	215	117	54
Investment	296	128	43
Miscellaneous	377	172	51
Railways	186	77	41
Public Works	86	32	37
Hotels	296	113	37
Fishing	45	17	37
Trading	539	193	35
Shipping	263	94	35
Manufacturing	1016	352	34
Assurance	190	62	32
Telegraph	64	21	32
Mining	1419	439	30
Conveyance	79	24	30
Printing	158	43	27
Shipbuilding	64	17	26
Banking and Finance	291	49	16
Total	7056	2974	42

[1] Levi, *op. cit.*, p. 37. Levi observed to the Statistical Society in 1870 that the business of the country was gradually passing from the hands of private firms. (*Ibid.*, p. 2.)

The Economist observed just after mid-century that the enlargement of the market for almost every commodity, consequent upon the rapid increase in population and the extension of communication, was of itself begetting "a quasi necessity for companies."[60] Out of the long controversy there had emerged an instrument for the attraction, organization and utilization of capital resources; there had been forged one of the tools without which subsequent economic expansion would certainly have been seriously handicapped, if not impossible.[61]

Goschen wrote in 1868:

> Capital is on strike, out of employ! In England it has struck against limited liability; against railways; against promoters, contractors, and engineers; against joint-stock companies of every description . . . Chaos in railway

[60] Art., "Why Companies are Now Necessary," XIV (1856), 785.

[61] Professor Eli Heckscher's distinguished work, *Mercantilism* (2 vols., translated by M. Shapiro, London [1935]), has come to hand at the conclusion of this study. He states that in his opinion (I, 367) limited liability has "*neither in earlier history nor at the present time* [my italics] the economic significance which it may presumably have from a legal point of view. . . . From the economic point of view the principal importance of limited liability is that it stresses the independent capital of the company against the private property of individual shareholders, who are constantly changing. A form of enterprise thus arises which is able to carry long term investments, but plainly its economic position may possibly be such that it does not involve claims on the private property of shareholders at all, so that the question of limited or unlimited liability does not arise." This, I submit, begs the question. In earlier centuries corporate organization was no doubt of chief importance as a vehicle of government or as an instrument to effect unified administration, with limited liability of secondary significance. However, inasmuch as the corporation has since become in the main a device for raising and putting to use large masses of capital, it would seem that limitation of shareholders' liability is an economic *sine qua non*. Considering the volatile character of our economic life and the ever-recurring development of new industries which involve uncertainty and risk, its absence (if that were conceivable today) would inevitably raise the supply price of capital. And was not limited liability a factor of prime importance in the international flow of capital in the nineteenth century? Without it, for instance, would English investors have financed the development of American railways to anything like the extent they did? Professor Heckscher argues, further, from the coexistence in Sweden of banks with limited and banks with unlimited liability. But are banks typical? Peculiar obligations to depositors have long been characteristic in the United States—while the liability of shareholders of national banks has been limited, they have been subject to a liability double that of shareholders in the ordinary business corporation. And in England, while liability is also limited, all of the great joint-stock banks have "in reserve" a considerable amount of un-called capital. Nor has the large private banking partnership disappeared in either country.

matters, chaos in all the relations of limited liability has prostrated our energies and prevented our recovery. Mismanagement in its time of tribulation has discredited joint-stock enterprise no less than its exuberant indiscretions when all went well. Limited liability has been sharply pulled up. The wide channels which it opened up for pouring capital into the dearest markets have been blocked for the nonce.[62]

For the nonce only, however. As a form of business organization, the limited liability company was destined to ever increasing dominance. In the nineties the classic jester of Victorian days was to sing:

> King
> And do I understand you that Great Britain
> Upon this Joint Stock principle is governed?
>
> Mr. Gold
> We haven't come to that, exactly—but
> We're tending rapidly in that direction.
> The date's not distant.[63]

[62] *Op. cit.*, pp. 78; 83 (published originally in the *Edinburgh Review*, CXXVII [1868], 242–80).

[63] W. S. Gilbert, *Utopia, Ltd.; or, The Flowers of Progress*, first produced at the Savoy, October 7, 1893.

APPENDIX

PROVISIONS OF *TABLE A*, COMPANIES ACT OF 1862

Accounts

(78.) The directors shall cause true accounts to be kept,—

Of the stock in trade of the company;
Of the sums of moneys received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and,
Of the credits and liabilities of the company.

The books of account shall be kept at the registered office of the company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business.

(79.) Once at the least in every year the directors shall lay before the company in general meeting, a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

(80.) The statement so made shall shew, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries and other like matters: every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

(81.) A balance-sheet shall be made out in every year, and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under

the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

(82.) A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

Audit

(83.) Once at the least in every year, the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors.

(84.) The first auditors shall be appointed by the directors: subsequent auditors shall be appointed by the company in general meeting.

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86.) The auditors may be members of the company: but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.

(87.) The election of auditors shall be made by the company at their ordinary meeting in each year.

(88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.

(89.) Any auditor shall be re-eligible on his quitting office.

(90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

(91.) If no election of auditors is made in manner aforesaid the Board of Trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.

(92.) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

(93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the

books and accounts of the company: he may, at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.

(94.) The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

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18/19 Vict., c. 133.	An Act for limiting the Liability of Members of certain Joint Stock Companies.
19/20 Vict., c. 47.	An Act for the Incorporation and Regulation of Joint Stock Companies, and other Associations.
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